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UNITED STATES DEPARTMENT OF THE INTERIOR

WASHINGTON, D.C. 20240

Secretary of the Interior Manuel Lujan, Jr.

Office of Hearings and Appeals--James L. Byrnes, Director

Office of the Solicitor---------Ralph W. Tarr, Solicitor

INDEX-DIGEST

JANUARY-SEPTEMBER 1989

This index-digest covers all the published and all the important unpublished decisions and opinions of the Department of the Interior for the period from January 1, through September 30, 1989, rendered in the Office of Hearings and Appeals, Ballston Towers, Building No. 3, 4015 Wilson Boulevard, Arlington, Va. 22203 and in the Office of the Solicitor, Interior Building, 18th and C Streets, N.W., Washington, D.C. 20240.

Decisions and opinions cited as appearing in 96 I.D. are published and copies may be obtained by subscription from the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402. Other decisions and opinions are unpublished and copies may be obtained from the Office of Hearings and Appeals or the Office of the Solicitor as provided in 43 CFR Part 2.

Editor: Rachael Cubbage

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SYMBOLS

ANCAB - Alaska Native Claims Appeals Board
IA-T - Indian Appeals--Tort
IBCA - Interior Board of Contract Appeals
IBIA - Interior Board of Indian Appeals
IBLA - Interior Board of Land Appeals
IBSMA - Interior Board of Surface Mining Appeals
M - Solicitor's Opinion
OHA - Office of Hearings and Appeals
SEC - Office of the Secretary

ACCOUNTS

FEES AND COMMISSIONS

There is no authority for BLM to refund the adoption fee required under 43 CFR 4750.4-2 when the adopter takes custody of a wild horse, but fails to comply with the terms of the private maintenance and care agreement and governing regulations, thereby justifying BLM in terminating the agreement and repossessing the horse.

Grant F. Morey, 108 IBLA 354 (May 12, 1989)

An amended regulation governing payment of the cost of publishing the notice of a competitive oil and gas lease sale may be applied to a pending matter where, absent intervening rights or countervailing public policy reasons, the amended regulation will benefit the affected party.

Alvin L. Terry, Jr., 110 IBLA 360 (Sept. 14, 1989)

PAYMENTS

The holder of an Outer Continental Shelf oil and gas lease who timely pays royalty in kind, rather than in money, may not be assessed a late fee pursuant to 30 CFR 218.150(d), even if it failed to accurately report the volume of the production with the result that the United States failed to collect the proper amount of money when it sold that production to third parties.

Mobil Oil Corp., Mobil Oil Exploration & Producing Southeast Inc., 107 IBLA 332 (Mar. 14, 1989)

The Minerals Management Service is authorized to impose late payment charges or exact interest as compensation for the loss of use of money due but not paid as royalties.

Mesa Petroleum Co., 108 IBLA 149 (Apr. 5, 1989)

ACCOUNTS--Continued

REFUNDS

There is no authority for BLM to refund the adoption fee required under 43 CFR 4750.4-2 when the adopter takes custody of a wild horse, but fails to comply with the terms of the private maintenance and care agreement and governing regulations, thereby justifying BLM in terminating the agreement and repossessing the horse.

Grant F. Morey, 108 IBLA 354 (May 12, 1989)

ACCRETION

In apportioning accreted lands between adjoining sections, BLM properly disregards partition lines previously determined by proportioning the new frontage between two zero accretion points, one of which is within an area which has subsequently been determined to have formed through the process of avulsion.

In apportioning accreted land between adjoining sections, BLM is not required to use a privately surveyed partition line established by the perpendicular method where the private surveyor had no adequate justification for not employing the proportionate shoreline method and, thus, the line was not within the allowable limit of error.

Where BLM has failed to adequately justify not employing the proportionate shoreline method for apportioning accreted land between adjoining sections and that approach will result in an equitable apportionment of the accreted land, the Board will remand the case to BLM for adoption of that method in a corrected survey.

First American Title Insurance Co. v. Bureau of Land Management, Fort Mojave Indian Tribe (Intervenor), 110 IBLA 25 (July 7, 1989)

ACQUIRED LANDS

Where land has been conveyed to the United States reserving to the grantors the exclusive right to prospect for and exploit the oil and gas underlying the land and that reservation has been extended beyond its initial term by production, in accordance with the terms of the deed, the United States has, during the extended term, no interest in any of that oil and gas sufficient to form the basis for claiming compensatory royalty because of drainage.

Doris Slaaten, 107 IBLA 16 (Jan. 25, 1989)

ACT OF SEPTEMBER 28, 84

Under sec. 306 of the Act of Sept. 28, 1984 (the Utah Wilderness Act), Congress authorized BLM to issue leases for carbon dioxide gas in five areas within the Escalante KGS, subject to express restrictions on "exploration" and "development." Where BLM offers the areas for lease subject to a stipulation that fails adequately to enforce the statutory restrictions, and where BLM imposes this stipulation on only three of these five areas covered by sec. 306 of this Act, BLM's decision to receive bids on these areas will be set aside and the case remanded for issuance of leases of the five areas without the stipulation.

Southern Utah Wilderness Alliance et al., 108 IBLA 318 (Apr. 28, 1989)

ADMINISTRATIVE AUTHORITY

GENERALLY

The Secretary has the authority to issue corrective patents when necessary to eliminate errors. A party seeking a corrective patent initiates the proceeding by filing an application asserting ownership of lands described in and based upon a patent or other document containing an alleged error. However, when the error does not lie in the patent or other document under which the applicant is asserting ownership, but lies in a patent issued to another

ADMINISTRATIVE AUTHORITY--Continued

GENERALLY--Continued

party, the Secretary does not have authority to correct the other party's patent.

Genaro M. Roybal, 107 IBLA 75 (Jan. 30, 1989)

Where a decision of the Director, Minerals Management Service, is approved by an Assistant Secretary, the decision is final for the Department and the Board of Land Appeals lacks jurisdiction to review either the substance thereof or the procedures followed in issuing the decision.

Marathon Oil Co., 108 IBLA 177 (Apr. 12, 1989)

An Alaska Native allotment which has not automatically vested pursuant to ANILCA is properly adjudicated under the Act of May 17, 1906. The question of the validity of the application is separate and apart from the issue of the ownership of the lands named in the application, and the Department has the jurisdiction to address this question, even though the lands described in the application, may have been congressionally conveyed to another party. The Department had an ongoing trust obligation to Alaska Natives, and therefore retains jurisdiction to determine the validity of the Native allotment application. This action is necessary in order to determine whether it is necessary for the Department to take action to recover the land for the benefit of the Native applicant.

Kootznoowoo, Inc. v. Heirs of Jimmie Johnson, 109 IBLA 128 (June 8, 1989)

A BLM instruction memorandum is merely a document for internal use by BLM employees. Such documents are not regulations and have no legal force and effect.

Cities Service Oil & Gas Corp., 109 IBLA 322 (June 21, 1989)

ADMINISTRATIVE AUTHORITY--Continued

GENERALLY--Continued

The Board has no jurisdiction to adjudicate the propriety of a survey conducted by or on behalf of the Forest Service or of decisions by the Forest Service accepting such survey. However, such surveys do not constitute official surveys of the public lands of the United States, as the authority to conduct such surveys and resurveys is vested solely in the Secretary of the Interior, who in turn has delegated this authority to BLM. Thus, a Forest Service survey does not effect any change in the location of a corner, but is merely an administrative survey which the Forest Service uses in managing the National Forests.

Wilogene Simpson et al., 110 IBLA 271 (Sept. 13, 1989)

ESTOPPEL

Employees of the executive branch, including BLM, have no authority to depart from the requirements of statutes dealing with public lands. All citizens are deemed to have knowledge of such statutes. Thus, even though a coal lessee was erroneously advised by BLM that his coal lease would be subject to readjustment in 1999 rather than in 1989, the Government is not estopped from readjusting the lease in 1989 as provided by statute.

Chevron U.S.A., Inc., The Pittsburgh & Midway Coal Mining Co., 108 IBLA 96 (Mar. 29, 1989)

LACHES

The authority of the United States to enforce a public right or protect a public interest is not vitiated or lost by laches, neglict of duty, failure to act, or delays in the performance of duties.

Mallon Oil Co., 107 IBLA 150 (Feb. 10, 1989)

ADMINISTRATIVE PRACTICE

It is incumbent upon BLM to ensure that its decision is supported by a rational basis and that such basis is stated in the written decision, as well as being demonstrated in the administrative record accompanying the decision.

Eddeman Community Property Trust, 106 IBLA 376 (Jan. 19, 1989)

Under 25 CFR 88.1(c), a decision of a Bureau of Indian Affairs Area Director approving, disapproving, or conditionally approving a tribal attorney contract is final for the Department and is not subject to appeal with the Department.

Ronald T. Welch et al. v. Area Director, Minneapolis Area Office, Bureau of Indian Affairs, 17 IBIA 56 (Jan. 30, 1989)

ADMINISTRATIVE PROCEDURE

GENERALLY

The procedural safeguards that apply when civil penalties are levied pursuant to 30 U.S.C. § 1719 (1982), are not applicable to late payment interest charges assessed pursuant to 30 U.S.C. § 1721(a) (1982).

Coastal Oil and Gas Corp., et al., 108 IBLA 62 (Mar. 22, 1989)

Generally, BLM has the duty to examine whether a relinquishment of a Native allotment application was knowing and voluntary when the applicant declares it was not. However, where the evidence submitted by the applicant clearly shows, as a matter of law, the invalidity of the claim, it is unnecessary to conduct a factual investigation of the circumstances of the relinquishment.

Where a Native allotment applicant asserts entitlement to a hearing in order to establish when use and occupancy of the claimed land commenced, no hearing is necessary where, accepting as true the applicant's allegations regarding his use and occupancy, applicant

ADMINISTRATIVE PROCEDURE--Continued

GENERALLY--Continued

is not entitled, as a matter of law, to a Native allotment.

Jonas Ningeok, 109 IBLA 347 (June 23, 1989)

Where an adverse party files an untimely motion for extension of time within which to file an answer, the Board of Land Appeals may, in its discretion, grant the motion pursuant to 43 CFR 4.22(f).

American Gilsonite, 111 IBLA 1 (Sept. 19, 1989)
96 I.D. 408

ADJUDICATION

A group is not entitled to personal notice of all planned actions affecting public lands in Nevada simply because it has asserted a general interest in natural resource development in the State.

The Wilderness Society, 110 IBLA 67 (July 20, 1989)

ADMINISTRATIVE LAW JUDGES

In order to sustain a charge that an Administrative Law Judge should be disqualified or his decision set aside because of bias or misconduct, a substantial showing of such bias or misconduct must be made. An assumption that he might be predisposed in favor of the Government is not sufficient.

United States v. Charles M. Crawford, dba Casi Mining & Mineral Exploration Co., 109 IBLA 264 (June 16, 1989)

ADMINISTRATIVE PROCEDURE ACT

Parties to an Indian probate proceeding are entitled to notice of the taking of a will scrivener's deposition and to the opportunity to cross-examine

ADMINISTRATIVE PROCEDURE--Continued

ADMINISTRATIVE PROCEDURE ACT--Continued

him/her, in accordance with 43 CFR 4.221(e) and the Administrative Procedure Act, 5 U.S.C. § 556(d) (1982).

Estate of Lucy Buffalo Little Coyote, aka Thyra Redbird, 17 IBIA 31 (Jan. 10, 1989)

Under the regulations then in effect, a transportation allowance formula issued by Minerals Management Service fixing the rate of return on undepreciated investment to be included in the formula is not subject to the notice and comment provisions of 5 U.S.C. § 553(b) (1982).

Conoco, Inc., 109 IBLA 89 (May 31, 1989)

ADMINISTRATIVE RECORD

By regulation 43 CFR 3833.0-5(m), the Department considers affidavits of annual assessment work or notices of intention to hold to be timely filed if placed in an envelope postmarked by the U.S. Postal Service on or before Dec. 30 and received in the proper BLM office on or before the following Jan. 19. Where the record shows that a mining claimant utilized the U.S. Postal Service to deliver his affidavit of assessment work and that it was received by the proper BLM office on Jan. 6, 1986, but the record does not contain the envelope in which the affidavit was sent, the mining claimant will not be required to bear the consequences of BLM's failure to retain the envelope, and a decision declaring the claim abandoned and void will be reversed.

Gary Hennis, 108 IBLA 121 (Mar. 30, 1989)

ADMINISTRATIVE REVIEW

The Board of Indian Appeals will not consider the merits of a moot appeal where there is no showing that it involves a potentially recurring question raised by

ADMINISTRATIVE PROCEDURE--Continued

ADMINISTRATIVE REVIEW--Continued

a short-term order, capable of repetition, yet evading review.

Herschel Sahmaunt et al. v. Area Director, Anadarko Area Office, Bureau of Indian Affairs, 17 IBIA 60 (Jan. 30, 1989)

The Board will not dismiss as moot an appeal from a BLM decision approving an application for a permit to drill within a designated resource protection zone surrounding units of the Hovenweep National Monument, even though the well has been drilled, plugged, and abandoned, where the appeal presents a significant issue regarding the adequacy of BLM's assessment of the environmental impact of approving the application, and the record indicates the issue is likely to recur within the protection zone.

Colorado Environmental Coalition et al., 108 IBLA 10 (Mar. 20, 1989)

The Board of Land Appeals does not have jurisdiction to review appeals of decisions to approve or amend a resource management plan. Because a resource management plan establishes management policy, its approval is subject only to protest to the Director of the Bureau of Land Management, whose decision is final for the Department. Nor does the Board possess authority to review land classification determinations made by BLM. However, actions on applications following classification of land and decisions which implement a management plan or amendment are appealable to the Board.

The Desert Tortoise Habitat Management Plan is a document designed to guide and control future management actions and does not take specific action or implement a decision or action. The "management actions" it identifies are not the type of specific actions or land-use decisions which are appealable to the Board.

California Ass'n of Four Wheel Drive Clubs, Inc., 108 IBLA 140 (Apr. 3, 1989)

ADMINISTRATIVE PROCEDURE--Continued

ADMINISTRATIVE REVIEW--Continued

Where a decision of the Director, Minerals Management Service, is approved by an Assistant Secretary, the decision is final for the Department and the Board of Land Appeals lacks jurisdiction to review either the substance thereof or the procedures followed in issuing the decision.

Marathon Oil Co., 108 IBLA 177 (Apr. 12, 1989)

The Board of Land Appeals does not have jurisdiction to review appeals of decisions to approve or amend a resource management plan or land classification determinations rendered by BLM. Because a resource management plan establishes management policy, its approval is subject only to protest to the Director, BLM, whose decision is final for the Department. On the other hand, actions on applications following classification of land and decisions which implement a resource management plan or amendment are appealable to the Board.

The Wilderness Society, 109 IBLA 175 (June 9, 1989)

A group that has not participated in agency decisionmaking prior to approval by BLM of a mining plan of operations is not a "party to a case" within the meaning of 43 CFR 4.410(a) for purposes of appeal.

A group is not entitled to personal notice of all planned actions affecting public lands in Nevada simply because it has asserted a general interest in natural resource development in the State.

Except in areas under wilderness review, mining plans of operations become effective immediately upon the approval pursuant to provision of 43 CFR 3809.4(b). This regulatory provision makes approval of a mining plan of operations a final Departmental action immediately subject to judicial review.

To obtain standing for review by the Board of Land Appeals a party must have participated in Bureau of Land Management decisionmaking prior to issuance of the decision sought to be reviewed. Even though a group may

ADMINISTRATIVE PROCEDURE--Continued

ADMINISTRATIVE REVIEW--Continued

be adversely affected by decisionmaking, it lacks standing to appeal if it is not a party to the case.

The Wilderness Society, 110 IBLA 67 (July 20, 1989)

When the Board conducts de novo review of a decision of an Administrative Law Judge who erroneously allocated the burden of proof in a private contest proceeding to the applicant for a Native allotment rather than to the contestant, the Board properly reviews the entire record to determine whether the applicant established by a preponderance of the evidence that he satisfactorily proved he was entitled to an allotment.

Ira Wassillie (On Reconsideration), 111 IBLA 53 (Sept. 20, 1989)

A party is not required to appeal from a BLM letter which does not adversely affect it, is informative in nature, and does not set forth appeal rights.

Chevron U.S.A. Inc., 111 IBLA 96 (Sept. 28, 1989)

BURDEN OF PROOF

There is a legal presumption that administrative officials have properly discharged their duties and not lost or misplaced legally significant documents properly filed with them. This presumption is not rebutted where appellant asserts that royalty checks were timely mailed, but the checks were not cashed and there is no evidence the checks were received by Minerals Management Service.

Nahama & Weagant Energy Co., 108 IBLA 209 (Apr. 19, 1989)

ADMINISTRATIVE PROCEDURE--Continued

BURDEN OF PROOF--Continued

In order to sustain a charge that an Administrative Law Judge should be disqualified or his decision set aside because of bias or misconduct, a substantial showing of such bias or misconduct must be made. An assumption that he might be predisposed in favor of the Government is not sufficient.

When the Government contests mining claims on a charge of lack of discovery of a valuable mineral deposit, it has the burden of going forward with sufficient evidence to establish a prima facie case as to that charge; however, the mining claimant has the ultimate burden of refuting the Government's case by a preponderance of the evidence.

United States v. Charles M. Crawford, dba Casi Mining & Mineral Exploration Co., 109 IBLA 264 (June 16, 1989)

DECISIONS

It is incumbent upon BLM to ensure that its decision is supported by a rational basis and that such basis is stated in the written decision, as well as being demonstrated in the administrative record accompanying the decision.

Eddeman Community Property Trust, 106 IBLA 376 (Jan. 19, 1989)

The Department of the Interior has authority to reopen an Osage probate upon a showing that the approval of a will was given under a mistake of fact.

Robert M. Maurer v. Muskogee Area Director, Bureau of Indian Affairs, 17 IBIA 129 (May 17, 1989)

ADMINISTRATIVE PROCEDURE--Continued

DECISIONS--Continued

A group is not entitled to personal notice of all planned actions affecting public lands in Nevada simply because it has asserted a general interest in natural resource development in the State.

The Wilderness Society, 110 IBLA 67 (July 20, 1989)

HEARINGS

Pursuant to 43 CFR 3533.4(b), an applicant for a potassium preference right lease whose application is rejected by the Bureau of Land Management is entitled to a hearing before an Administrative Law Judge, if the applicant has alleged in the application facts the applicant believes to be sufficient to show entitlement to a lease.

Earth Sciences, Inc., 106 IBLA 313 (Jan. 6, 1989)

When an appellant fails to submit any evidence tending to contradict the evidence presented by the Bureau of Land Management, there is no factual dispute and the Board will reject appellant's request for an evidentiary hearing pursuant to 43 CFR 4.415.

Lazy VD Land & Livestock Co., 108 IBLA 224 (Apr. 19, 1989)

Generally, BLM has the duty to examine whether a relinquishment of a Native allotment application was knowing and voluntary when the applicant declares it was not. However, where the evidence submitted by the applicant clearly shows, as a matter of law, the invalidity of the claim, it is unnecessary to conduct a factual investigation of the circumstances of the relinquishment.

Where a Native allotment applicant asserts entitlement to a hearing in order to establish when use and occupancy of the claimed land commenced, no hearing is necessary where, accepting as true the applicant's allegations regarding his use and occupancy, applicant

ADMINISTRATIVE PROCEDURE--Continued

HEARINGS--Continued

is not entitled, as a matter of law, to a Native allotment.

Jonas Ningeok, 109 IBLA 347 (June 23, 1989)

The Director, MMS, held that the lessee violated 30 CFR 250.41(a)(2) because it knew or should have known that its actions could result in a blowout leading to the loss of gas. The lessee has responded claiming that, based upon information available to it during drilling, its actions were reasonable and prudent, and that the sole cause of the well loss was unforseeable. The record presents unresolved factual issues, and a hearing before an Administrative Law Judge is ordered.

Chevron U.S.A. Inc., et al., 110 IBLA 216 (Aug. 23, 1989)

JUDICIAL REVIEW

Except in areas under wilderness review, mining plans of operations become effective immediately upon the approval pursuant to provision of 43 CFR 3809.4(b). This regulatory provision makes approval of a mining plan of operations a final Departmental action immediately subject to judicial review.

The Wilderness Society, 110 IBLA 67 (July 20, 1989)

RULEMAKING

Under the regulations then in effect, a transportation allowance formula issued by Minerals Management Service fixing the rate of return on undepreciated investment to be included in the formula is not subject to the notice and comment provisions of 5 U.S.C. § 553(b) (1982).

Conoco, Inc., 109 IBLA 89 (May 31, 1989)

ADMINISTRATIVE PROCEDURE--Continued

RULEMAKING--Continued

A policy guideline interpreting the royalty valuation regulation as it applies to natural gas liquid products is properly distinguished from a regulation having the force and effect of law promulgated in accordance with the rulemaking requirements of the Administrative Procedure Act. Although such a policy guideline is not binding on the Board and will not be followed where it is inconsistent with the relevant regulation, it will be upheld by the Board on appeal where it provides a reasonable basis for a decision applying the royalty valuation regulation and is consistent therewith.

Conoco Inc., ARCO Oil & Gas Co., 110 IBLA 232 (Aug. 29, 1989)

STANDING

The owner of improvements located on land described in a Native allotment application has standing to protest the allotment application under sec. 905 of the Alaska National Interest Lands Conservation Act, 43 U.S.C. § 1634 (1982). Standing to appeal favorable adjudication of the allotment application and rejection of the protest to the Board of Land Appeals requires a showing of a legally cognizable interest adversely affected by denial of the protest. The interest of a trespasser on the land without claim or color of right will not afford such standing.

Eugene M. Witt, 107 IBLA 229 (Feb. 21, 1989)

Where the Director, MMS, issues a decision in which he reserves the right to conduct further audits of certain Federal oil and gas leases and processing plants, the royalty payor is not adversely affected and, therefore, lacks standing to appeal that declaration.

Phillips Petroleum Co., 109 IBLA 4 (May 23, 1989)

ADMINISTRATIVE PROCEDURE--Continued

STANDING--Continued

An individual who submits proof of residing within three-fourths of a mile of a coal preparation plant, and shows that he may be adversely affected by traffic and air pollution caused by coal trucks transporting coal to the plant has standing within the meaning of 30 CFR 700.5 to seek review of OSMRE's approval of a permit to operate the plant.

Frank Stebly v. Office of Surface Mining Reclamation & Enforcement, 109 IBLA 242 (June 16, 1989)

A tribal member lacks standing to bring an administrative action for the tribe based on a personal assessment of what is or is not in the best interests of the tribe.

Elaine Frease & Bessey Villalobos v. Sacramento Area Director, Bureau of Indian Affairs, 17 IBIA 250 (Aug. 24, 1989)

An appeal from a BLM decision dismissing a protest of a BLM dependent resurvey which did not affect any corner or line separating Federal from the protestant's private land will be dismissed where the protestants were not adversely affected by the decision.

Wilogene Simpson et al., 110 IBLA 271 (Sept. 13, 1989)

ALASKA

HEADQUARTERS SITES

Summary dismissal of a private contest against an Alaska headquarters site cannot be sustained on grounds the contestee was not served with the contest complaint where, on appeal, the contestant produces proof that the complaint was served in conformity to 43 CFR 4.450-5.

Pursuant to 43 CFR 4.450-1, a private contest may not be brought for reasons appearing of record with the Bureau of Land Management. Where all the matters alleged by a contest complaint appear on agency records

ALASKA--Continued

HEADQUARTERS SITES--Continued

at the time the complaint is filed, it is subject to summary dismissal.

Kim M. Cook v. Mary Frances DeHart Buren, 106 IBLA 294 (Jan. 5, 1989)

HOMESITES

Where it appears that occupancy of a homesite in Alaska began in Sept. 1983, calculation of years of occupancy must commence with that date. There is no requirement that occupancy for purposes of establishing a homesite claim pursuant to 43 U.S.C. § 687a (1982), be continuous throughout any given calendar year.

Kim M. Cook v. Mary Frances DeHart Buren, 106 IBLA 294 (Jan. 5, 1989)

HOMESTEADS

The Board will affirm a BLM decision finding land proper for selection by the State of Alaska in the face of an appeal challenging that decision on the basis that the appellants have a superior interest in the land by virtue of a prior homestead entry where final proof submitted in support of that entry was rejected by BLM with administrative finality and appellants have not demonstrated that the rejection was erroneous.

Estate of Sam McGee & Alice Jo McGee-Ward-Pritchard, 108 IBLA 375 (May 19, 1989)

LAND GRANTS AND SELECTIONS

BLM may properly declare a mining claim located on land segregated from mineral entry, pursuant to 43 CFR 2627.4(b), by virtue of the filing of an Alaska State selection application, null and void ab initio when there is no showing that the claim relates back to a date of location prior to the segregation.

Sec. 906 (e) of ANILCA, 43 U.S.C. § 1635 (e) (1982), amended the Alaska Statehood Act to permit the State to file new applications to include lands which were not

ALASKA--Continued

LAND GRANTS AND SELECTIONS--Continued

vacant, unappropriated, and unreserved at the time the sec. 906(e) "top filing" application was filed. Such State selection applications become an effective selection upon the date the lands become available within the meaning of the Alaska Statehood Act. Lands subject to valid mining claims on the date a state "top filing" application is filed become subject to state selection when the claims are abandoned, either intentionally or by action of law.

Vernon F. Miller, 110 IBLA 20 (July 6, 1989)

NATIVE ALLOTMENTS

The owner of improvements located on land described in a Native allotment application has standing to protest the allotment application under sec. 905 of the Alaska National Interest Lands Conservation Act, 43 U.S.C. § 1634 (1982). Standing to appeal favorable adjudication of the allotment application and rejection of the protest to the Board of Land Appeals requires a showing of a legally cognizable interest adversely affected by denial of the protest. The interest of a trespasser on the land without claim or color of right will not afford such standing.

Eugene M. Witt, 107 IBLA 229 (Feb. 21, 1989)

Under sec. 905(c) of the Alaska National Interest Lands Conservation Act, 43 U.S.C. § 1634(c) (1982), an amendment to a Native allotment application may be filed only where the applicant is seeking land different from the land described in the original application. No amendment may be allowed under that section where the applicant is seeking land in addition to that described in the original application.

Where a Native allotment applicant alleges that he timely made an application for an allotment of a specific parcel of land with officials of the Bureau of Indian Affairs but, through no fault of his own, this parcel was not included within the application which the Bureau of Indian Affairs filed with the Bureau of Land Management, the applicant will be afforded a fact-finding hearing in which he may

ALASKA--Continued

NATIVE ALLOTMENTS--Continued

attempt to show that he did, in fact, make timely application for the parcel in question.

Donald Peter, 107 IBLA 272 (Feb. 23, 1989)

Where on appeal from a BLM decision rejecting a Native allotment application because the application was not pending before the Department on Dec. 18, 1971, the Board determines that there is a question of fact whether the application was pending on that date, the Board will set aside the BLM decision and refer the case for a hearing before an Administrative Law Judge.

June I. Degnan, 108 IBLA 282 (Apr. 26, 1989)

If a proper party lodged a timely protest of a Native allotment application filed pursuant to the Act of May 17, 1906, 34 Stat. 197, that application is removed from the automatic vesting provisions of ANILCA, and is adjudicated pursuant to the Act of May 17, 1906. If, after adjudication, BLM issues a decision holding the Native allotment application for approval, the adjudicatory process had been carried to the point of a BLM decision on the merits of the application. Having preserved his rights under sec. 905(a)(1) of ANILCA, the party is entitled to initiate a private contest upon receipt of notice of BLM's intent to grant the Native allotment.

When the decision holding the Native allotment application for approval also rejects a selection application filed pursuant to ANCSA, and affords the Native village corporation the opportunity to initiate a private contest, the Native village corporation has a choice regarding how to continue its objections to the approval of the Native allotment application. It may initiate a private contest or allow the decision to become final and appeal from that decision. If it elects to file a private contest, it is not required to pursue an appeal.

An Alaska Native allotment which has not automatically vested pursuant to ANILCA is properly adjudicated under the Act of May 17, 1906. The question of the validity of the application is separate and apart from the issue of the ownership of the lands named in the application, and the Department has the jurisdiction to

ALASKA--Continued

NATIVE ALLOTMENTS--Continued

address this question, even though the lands described in the application, may have been congressionally conveyed to another party. The Department had an ongoing trust obligation to Alaska Natives, and therefore retains jurisdiction to determine the validity of the Native allotment application. This action is necessary in order to determine whether it is necessary for the Department to take action to recover the land for the benefit of the Native applicant.

An Alaska Native allotment applicant is required to make satisfactory proof of substantially continuous use and occupancy of the land for a minimum period of 5 years. Such use and occupancy contemplates substantial actual possession or use of the land, at least potentially exclusive of others. In a private contest initiated by a Native corporation following a BLM decision holding the Native allotment for approval, the Native corporation carries the burden of showing by a preponderance of the evidence that the Native allotment application is not valid.

A conveyance to a Native corporation under ANSCA is subject to valid existing rights. A conflicting application based on settlement and occupancy maintained under laws leading to acquisition of title is properly excluded from an ANSCA conveyance.

Kootznoowoo, Inc. v. Heirs of Jimmie Johnson, 109 IBLA 128 (June 8, 1989)

Sec. 905(a)(1) of ANILCA, 43 U.S.C. § 1634(a) (1982), approved, subject to valid existing rights and certain exceptions, all Native allotment applications which were pending before the Department on or before Dec. 18, 1971. Pursuant to Pence v. Kleppe, 529 F.2d 135 (9th Cir. 1976), if a Native allotment applicant is rejected, and the rejection is based on factual issues, the applicant must be granted an opportunity for an oral hearing before a trier of fact before a decision to reject an allotment application can be considered to be final. In such case the application should be reinstated and considered to be pending on Dec. 18, 1971.

Sec. 905(a)(1) of ANILCA, 43 U.S.C. § 1634(a) (1982), approved, subject to valid existing rights and certain exceptions, all Native allotment applications which were pending before the Department on or before

ALASKA--Continued

NATIVE ALLOTMENTS--Continued

Dec. 18, 1971. One of these exceptions, which is found at sec. 905(a)(4) of ANILCA, 43 U.S.C. § 1634(a)(4) (1982), provides that when an allotment application describes land which on or before Dec. 18, 1971, was validly selected by the State of Alaska pursuant to the Alaska Statehood Act it shall be adjudicated pursuant to the requirements of the Act of May 17, 1906, as amended. The filing of a homestead entry application segregates the land from all State selection. The filing of an acceptable application for a Native allotment also segregates the land, and a subsequent State application for all available lands, not accompanied by a showing that the applicant for allotment has permanently abandoned occupancy of the land, will create no rights as to the lands subject to the Native allotment application.

Sec. 906(e) of ANILCA, 43 U.S.C. § 1635(e) (1982), permits the State to file State selection applications and amendments thereto, and to refile existing applications to include lands not available for selection under the Alaska Statehood Act when the application is filed. The "top filed" lands will become subject to the selection effective the date the lands become available within the meaning of the Alaska Statehood Act. A State selection made by refiling an existing State selection application incorporates only those additional lands which become available for selection within the meaning of the Alaska Statehood Act on or after the date the selection application is refiled.

When an applicant has filed a Native allotment application prior to Dec. 18, 1971, and BLM has rejected the application, but did not afford an opportunity for a hearing, the reinstated application should be considered as pending on Dec. 18, 1971. Such Native allotment applications are subject to the legislative conveyance provision of sec. 905 of ANILCA if there is no basis for a finding that, by reason of an exception to the legislative conveyance, the application must be adjudicated pursuant to the requirements of the Act of May 17, 1906, as amended.

State of Alaska, 109 IBLA 339 (June 22, 1989)

ALASKA--Continued

NATIVE ALLOTMENTS--Continued

Generally, BLM has the duty to examine whether a relinquishment of a Native allotment application was knowing and voluntary when the applicant declares it was not. However, where the evidence submitted by the applicant clearly shows, as a matter of law, the invalidity of the claim, it is unnecessary to conduct a factual investigation of the circumstances of the relinquishment.

In order for a Native allotment applicant to gain a vested right to an allotment, the applicant must show 5-year's use and occupancy of the land and the filing of an application therefor. Where a Native uses and occupies land but does not file a Native allotment application for such land and thereafter ceases use and occupancy of the land for more than 20 years, during which time the Federal Government withdraws the land from appropriation under the public land laws, including the Native Allotment Act, a Native allotment application subsequently filed for the land must be rejected.

Where a Native allotment applicant asserts entitlement to a hearing in order to establish when use and occupancy of the claimed land commenced, no hearing is necessary where, accepting as true the applicant's allegations regarding his use and occupancy, applicant is not entitled, as a matter of law, to a Native allotment.

Jonas Ningeok, 109 IBLA 347 (June 23, 1989)

Where a Native initiates use and occupancy of certain lands in 1938, but prior to the filing of an allotment application, highway and power transmission rights-of-way are sought from and granted by BLM across such lands, subject to valid existing rights, the later filing of the allotment application vests the inchoate preference right arising from the use and occupancy, and that right relates back to the initiation of the use and occupancy, thereby taking precedence over the intervening rights-of-way applications. The subsequent legislative approval of the Native allotment in accordance with sec. 905(a) of the Alaska National Interest Lands Conservation Act, 43 U.S.C. § 1634(a) (1982), precludes any inquiry into the Native's use and occupancy of the land, and the Native allotment is a valid existing right which is properly recognized by a

ALASKA--Continued

NATIVE ALLOTMENTS--Continued

declaration that the rights-of-way are null and void to the extent they cross lands within the allotment.

State of Alaska, Golden Valley Electric Ass'n, 110 IBLA 224 (Aug. 24, 1989)

The effect of issuing a Native Allotment, like the issuance of patent, is to transfer the legal title from the United States and to remove the Department's jurisdiction to resolve conflicts concerning rights to the land.

The Bureau of Land Management's approval of a Native allotment application vests equitable title, but does not vest legal title. This equitable title is susceptible of being administratively modified or revoked by the Department if, prior to issuance of a Native Allotment, the Department finds that the land in question, or any part of it, was not vacant, unappropriated, and unreserved nonmineral land during the period of the applicant's use and occupancy.

A decision vacating approval of a Native allotment application will be set aside if the record is insufficient to justify the conclusion that lands withdrawn by Exec. Order No. 2089 embrace the lands identified in an application.

Ramona Field, 110 IBLA 367 (Sept. 14, 1989)

When it appears an applicant for a Native allotment may not have presented satisfactory proof of his substantially continuous use and occupancy of the land for a period of 5 years, the Board may, in the absence of legislative approval, review the record and act to prevent the mistaken issuance of a patent to the land to one not entitled to it, even if the Bureau of Land Management has already approved the application.

When the Board conducts de novo review of a decision of an Administrative Law Judge who erroneously allocated the burden of proof in a private contest proceeding to the applicant for a Native allotment rather than to the contestant, the Board properly reviews the entire record to determine whether the applicant established by a preponderance of the

ALASKA--Continued

NATIVE ALLOTMENTS--Continued

evidence that he satisfactorily proved he was entitled to an allotment.

Ira Wassillie (On Reconsideration), 111 IBLA 53 (Sept. 20, 1989)

Where a Native initiates use and occupancy of certain lands in 1937, but prior to the filing of an allotment application, a conflicting hot springs lease is issued and a public access trail was used to the hot springs, the later filing of the allotment application vests the inchoate preference right arising from the prior use and occupancy. That right relates back to the initiation of the use and occupancy, thereby taking precedence over the intervening hot springs lease and the use of the public access trail.

James E. Dawson, 111 IBLA 139 (Sept. 29, 1989)

STATEHOOD ACT

The Board will affirm a BLM decision finding land proper for selection by the State of Alaska in the face of an appeal challenging that decision on the basis that the appellants have a superior interest in the land by virtue of a prior homestead entry where final proof submitted in support of that entry was rejected by BLM with administrative finality and appellants have not demonstrated that the rejection was erroneous.

Estate of Sam McGee & Alice Jo McGee-Ward-Pritchard, 108 IBLA 375 (May 19, 1989)

Sec. 905(a)(1) of ANILCA, 43 U.S.C. § 1634(a) (1982), approved, subject to valid existing rights and certain exceptions, all Native allotment applications which were pending before the Department on or before Dec. 18, 1971. One of these exceptions, which is found at sec. 905(a)(4) of ANILCA, 43 U.S.C. § 1634(a)(4) (1982), provides that when an allotment application describes land which on or before Dec. 18, 1971, was

ALASKA--Continued

STATEHOOD ACT--Continued

validly selected by the State of Alaska pursuant to the Alaska Statehood Act it shall be adjudicated pursuant to the requirements of the Act of May 17, 1906, as amended. The filing of a homestead entry application segregates the land from all State selection. The filing of an acceptable application for a Native allotment also segregates the land, and a subsequent State application for all available lands, not accompanied by a showing that the applicant for allotment has permanently abandoned occupancy of the land, will create no rights as to the lands subject to the Native allotment application.

Sec. 906(e) of ANILCA, 43 U.S.C. § 1635(e) (1982), permits the State to file State selection applications and amendments thereto, and to refile existing applications to include lands not available for selection under the Alaska Statehood Act when the application is filed. The "top filed" lands will become subject to the selection effective the date the lands become available within the meaning of the Alaska Statehood Act. A State selection made by refiling an existing State selection application incorporates only those additional lands which become available for selection within the meaning of the Alaska Statehood Act on or after the date the selection application is refiled.

State of Alaska, 109 IBLA 339 (June 22, 1989)

TRADE AND MANUFACTURING SITES

Where, prior to May 31, 1981, a Native corporation for which land in Alaska has been withdrawn filed a protest against a trade and manufacturing site application covering that land, legislative approval of the site did not occur under sec. 1328(a) of the Alaska National Interest Land Conservation Act, 16 U.S.C. § 3215(a) (1982).

An applicant for a trade and manufacturing site fails to establish her entitlement to that site under the Trade and Manufacturing Site Act where, at a hearing convened following initiation of a Government contest challenging the validity of her claim, she fails to prove by a preponderance of the evidence that she had a reasonable expectation of deriving a profit from her cabin rental/recreational use business

ALASKA--Continued

TRADE AND MANUFACTURING SITES--Continued

conducted on the site at the time she filed her application to purchase the site.

United States v. Norma J. Hodge, 111 IBLA 77 (Sept. 26, 1989)

ALASKA NATIONAL INTEREST LANDS CONSERVATION ACT

GENERALLY

Where, prior to May 31, 1981, a Native corporation for which land in Alaska has been withdrawn filed a protest against a trade and manufacturing site application covering that land, legislative approval of the site did not occur under sec. 1328(a) of the Alaska National Interest Land Conservation Act, 16 U.S.C. § 3215(a) (1982).

United States v. Norma J. Hodge, 111 IBLA 77 (Sept. 26, 1989)

DUTY OF DEPARTMENT OF THE INTERIOR TO NATIVE ALLOTMENT APPLICANTS

The owner of improvements located on land described in a Native allotment application has standing to protest the allotment application under sec. 905 of the Alaska National Interest Lands Conservation Act, 43 U.S.C. § 1634 (1982). Standing to appeal favorable adjudication of the allotment application and rejection of the protest to the Board of Land Appeals requires a showing of a legally cognizable interest adversely affected by denial of the protest. The interest of a trespasser on the land without claim or color of right will not afford such standing.

Eugene M. Witt, 107 IBLA 229 (Feb. 21, 1989)

ALASKA NATIONAL INTEREST LANDS CONSERVATION ACT--Continued

DUTY OF DEPARTMENT OF THE INTERIOR TO NATIVE ALLOTMENT APPLICANTS--Continued

Sec. 905(a)(1) of ANILCA, 43 U.S.C. § 1634(a) (1982), approved, subject to valid existing rights and certain exceptions, all Native allotment applications which were pending before the Department on or before Dec. 18, 1971. Pursuant to Pence v. Kleppe, 529 F.2d 135 (9th Cir. 1976), if a Native allotment applicant is rejected, and the rejection is based on factual issues, the applicant must be granted an opportunity for an oral hearing before a trier of fact before a decision to reject an allotment application can be considered to be final. In such case the application should be reinstated and considered to be pending on Dec. 18, 1971.

Sec. 905(a)(1) of ANILCA, 43 U.S.C. § 1634(a) (1982), approved, subject to valid existing rights and certain exceptions, all Native allotment applications which were pending before the Department on or before Dec. 18, 1971. One of these exceptions, which is found at sec. 905(a)(4) of ANILCA, 43 U.S.C. § 1634(a)(4) (1982), provides that when an allotment application describes land which on or before Dec. 18, 1971, was validly selected by the State of Alaska pursuant to the Alaska Statehood Act it shall be adjudicated pursuant to the requirements of the Act of May 17, 1906, as amended. The filing of a homestead entry application segregates the land from all State selection. The filing of an acceptable application for a Native allotment also segregates the land, and a subsequent State application for all available lands, not accompanied by a showing that the applicant for allotment has permanently abandoned occupancy of the land, will create no rights as to the lands subject to the Native allotment application.

Sec. 906(e) of ANILCA, 43 U.S.C. § 1635(e) (1982), permits the State to file State selection applications and amendments thereto, and to refile existing applications to include lands not available for selection under the Alaska Statehood Act when the application is filed. The "top filed" lands will become subject to the selection effective the date the lands become available within the meaning of the Alaska Statehood Act. A State selection made by refiling an existing State selection application incorporates only those additional lands which become available for selection

ALASKA NATIONAL INTEREST LANDS CONSERVATION ACT--Continued

DUTY OF DEPARTMENT OF THE INTERIOR TO NATIVE ALLOTMENT APPLICANTS--Continued

within the meaning of the Alaska Statehood Act on or after the date the selection application is refiled.

When an applicant has filed a Native allotment application prior to Dec. 18, 1971, and BLM has rejected the application, but did not afford an opportunity for a hearing, the reinstated application should be considered as pending on Dec. 18, 1971. Such Native allotment applications are subject to the legislative conveyance provision of sec. 905 of ANILCA if there is no basis for a finding that, by reason of an exception to the legislative conveyance, the application must be adjudicated pursuant to the requirements of the Act of May 17, 1906, as amended.

State of Alaska, 109 IBLA 339 (June 22, 1989)

NATIVE ALLOTMENTS

Under sec. 905(c) of the Alaska National Interest Lands Conservation Act, 43 U.S.C. § 1634(c) (1982), an amendment to a Native allotment application may be filed only where the applicant is seeking land different from the land described in the original application. No amendment may be allowed under that section where the applicant is seeking land in addition to that described in the original application.

Where a Native allotment applicant alleges that he timely made an application for an allotment of a specific parcel of land with officials of the Bureau of Indian Affairs but, through no fault of his own, this parcel was not included within the application which the Bureau of Indian Affairs filed with the Bureau of Land Management, the applicant will be afforded a fact-finding hearing in which he may attempt to show that he did, in fact, make timely application for the parcel in question.

Donald Peter, 107 IBLA 272 (Feb. 23, 1989)

NATIVE ALLOTMENTS--Continued

The effect of issuing a Native Allotment, like the issuance of patent, is to transfer the legal title from the United States and to remove the Department's jurisdiction to resolve conflicts concerning rights to the land.

The Bureau of Land Management's approval of a Native allotment application vests equitable title, but does not vest legal title. This equitable title is susceptible of being administratively modified or revoked by the Department if, prior to issuance of a Native Allotment, the Department finds that the land in question, or any part of it, was not vacant, unappropriated, and unreserved nonmineral land during the period of the applicant's use and occupancy.

A decision vacating approval of a Native allotment application will be set aside if the record is insufficient to justify the conclusion that lands withdrawn by Exec. Order No. 2089 embrace the lands identified in an application.

Ramona Field, 110 IBLA 367 (Sept. 14, 1989)

STATE SELECTIONS

A selection by the State of Alaska under sec. 906(e) of the Alaska National Interest Lands Conservation Act, 43 U.S.C. § 1635(e) (1982), is, by definition, for lands that are not presently available for selection. Under the statute, the selection takes effect if and when the lands become available for selection. Until the selection takes effect, the selection has no present segregative effect.

State of Alaska, 108 IBLA 181 (Apr. 13, 1989)

Sec. 905(a)(1) of ANILCA, 43 U.S.C. § 1634(a) (1982), approved, subject to valid existing rights and certain exceptions, all Native allotment applications which were pending before the Department on or before Dec. 18, 1971. One of these exceptions, which is found at sec. 905(a)(4) of ANILCA, 43 U.S.C. § 1634(a)(4) (1982), provides that when an allotment application describes land which on or before Dec. 18, 1971, was validly selected by the State of Alaska pursuant to the

STATE SELECTIONS--Continued

Alaska Statehood Act it shall be adjudicated pursuant to the requirements of the Act of May 17, 1906, as amended. The filing of a homestead entry application segregates the land from all State selection. The filing of an acceptable application for a Native allotment also segregates the land, and a subsequent State application for all available lands, not accompanied by a showing that the applicant for allotment has permanently abandoned occupancy of the land, will create no rights as to the lands subject to the Native allotment application.

Sec. 906(e) of ANILCA, 43 U.S.C. § 1635(e) (1982), permits the State to file State selection applications and amendments thereto, and to refile existing applications to include lands not available for selection under the Alaska Statehood Act when the application is filed. The "top filed" lands will become subject to the selection effective the date the lands become available within the meaning of the Alaska Statehood Act. A State selection made by refiling an existing State selection application incorporates only those additional lands which become available for selection within the meaning of the Alaska Statehood Act on or after the date the selection application is refiled.

State of Alaska, 109 IBLA 339 (June 22, 1989)

VALID EXISTING RIGHTS

If a proper party lodged a timely protest of a Native allotment application filed pursuant to the Act of May 17, 1906, 34 Stat. 197, that application is removed from the automatic vesting provisions of ANILCA, and is adjudicated pursuant to the Act of May 17, 1906. If, after adjudication, BLM issues a decision holding the Native allotment application for approval, the adjudicatory process had been carried to the point of a BLM decision on the merits of the application. Having preserved his rights under sec. 905(a)(1) of ANILCA, the party is entitled to initiate a private contest upon receipt of notice of BLM's intent to grant the Native allotment.

When the decision holding the Native allotment application for approval also rejects a selection application filed pursuant to ANCSA, and affords the Native village corporation the opportunity to initiate a private contest, the Native village corporation has

ALASKA NATIONAL INTEREST LANDS CONSERVATION ACT--Continued

VALID EXISTING RIGHTS--Continued

a choice regarding how to continue its objections to the approval of the Native allotment application. It may initiate a private contest or allow the decision to become final and appeal from that decision. If it elect to file a private contest, it is not required to pursue an appeal.

An Alaska Native allotment which has not automatically vested pursuant to ANILCA is properly adjudicated under the Act of May 17, 1906. The question of the validity of the application is separate and apart from the issue of the ownership of the lands named in the application, and the Department has the jurisdiction to address this question, even though the lands described in the application, may have been congressionally conveyed to another party. The Department had an ongoing trust obligation to Alaska Natives, and therefore retains jurisdiction to determine the validity of the Native allotment application. This action is necessary in order to determine whether it is necessary for the Department to take action to recover the land for the benefit of the Native applicant.

A conveyance to a Native corporation under ANSCA is subject to valid existing rights. A conflicting application based on settlement and occupancy maintained under laws leading to acquisition of title is properly excluded from an ANSCA conveyance.

Kootznoowoo, Inc. v. Heirs of Jimmie Johnson, 109 IBLA 128 (June 8, 1989)

Sec. 905(a)(1) of ANILCA, 43 U.S.C. § 1634(a) (1982), approved, subject to valid existing rights and certain exceptions, all Native allotment applications which were pending before the Department on or before Dec. 18, 1971. One of these exceptions, which is found at sec. 905(a)(4) of ANILCA, 43 U.S.C. § 1634(a)(4) (1982), provides that when an allotment application describes land which on or before Dec. 18, 1971, was validly selected by the State of Alaska pursuant to the Alaska Statehood Act it shall be adjudicated pursuant to the requirements of the Act of May 17, 1906, as amended. The filing of a homestead entry application segregates the land from all State selection. The filing of an acceptable application for a Native allotment also segregates the land, and a subsequent State application for all available lands, not accompanied by a showing that the applicant for allotment has permanently

ALASKA NATIONAL INTEREST LANDS CONSERVATION ACT--Continued

VALID EXISTING RIGHTS--Continued

abandoned occupancy of the land, will create no rights as to the lands subject to the Native allotment application.

Sec. 906(e) of ANILCA, 43 U.S.C. § 1635(e) (1982), permits the State to file State selection applications and amendments thereto, and to refile existing applications to include lands not available for selection under the Alaska Statehood Act when the application is filed. The "top filed" lands will become subject to the selection effective the date the lands become available within the meaning of the Alaska Statehood Act. A State selection made by refiling an existing State selection application incorporates only those additional lands which become available for selection within the meaning of the Alaska Statehood Act on or after the date the selection application is refiled.

State of Alaska, 109 IBLA 339 (June 22, 1989)

ALASKA NATIVE CLAIMS SETTLEMENT ACT

GENERALLY

If a proper party lodged a timely protest of a Native allotment application filed pursuant to the Act of May 17, 1906, 34 Stat. 197, that application is removed from the automatic vesting provisions of ANILCA, and is adjudicated pursuant to the Act of May 17, 1906. If, after adjudication, BLM issues a decision holding the Native allotment application for approval, the adjudicatory process had been carried to the point of a BLM decision on the merits of the application. Having preserved his rights under sec. 905(a)(1) of ANILCA, the party is entitled to initiate a private contest upon receipt of notice of BLM's intent to grant the Native allotment.

When the decision holding the Native allotment application for approval also rejects a selection application filed pursuant to ANCSA, and affords the Native village corporation the opportunity to initiate a private contest, the Native village corporation has a choice regarding how to continue its objections to the approval of the Native allotment application. It may initiate a private contest or allow the decision to become final and appeal from that decision. If it

ALASKA NATIVE CLAIMS SETTLEMENT ACT--Continued

GENERALLY--Continued

elects to file a private contest, it is not required to pursue an appeal.

A conveyance to a Native corporation under ANSCA is subject to valid existing rights. A conflicting application based on settlement and occupancy maintained under laws leading to acquisition of title is properly excluded from an ANSCA conveyance.

Kootznoowoo, Inc. v. Heirs of Jimmie Johnson, 109 IBLA 128 (June 8, 1989)

CONVEYANCES

Generally

Pursuant to sec. 3(c) of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1602(e) (1982), BLM may properly exclude from an interim conveyance land which was used seasonally in connection with the administration of a Federal installation during the period of time that the land was available for selection by a Native village corporation, regardless of the amount of use occurring after the appropriate selection period.

Ahtna, Inc., 107 IBLA 266 (Feb. 23, 1989)

Regional Conveyances

Where a Native village corporation and a Native regional corporation have merged pursuant to 43 U.S.C. § 1627 (1982), BLM may properly include a consent stipulation, subjecting mining activity within the Native village to the consent of a separate entity composed of Native residents of the village, in an interim conveyance of land to the Native regional corporation.

Ahtna, Inc., 107 IBLA 266 (Feb. 23, 1989)

ALASKA NATIVE CLAIMS SETTLEMENT ACT--Continued

CONVEYANCES--Continued

Village Conveyances

Where a Native village corporation and a Native regional corporation have merged pursuant to 43 U.S.C. § 1627 (1982), BLM may properly include a consent stipulation, subjecting mining activity within the Native village to the consent of a separate entity composed of Native residents of the village, in an interim conveyance of land to the Native regional corporation.

Ahtna, Inc., 107 IBLA 266 (Feb. 23, 1989)

DEFINITIONS

Federal Installation

Pursuant to sec. 3(c) of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1602(e) (1982), BLM may properly exclude from an interim conveyance land which was used seasonally in connection with the administration of a Federal installation during the period of time that the land was available for selection by a Native village corporation, regardless of the amount of use occurring after the appropriate selection period.

Ahtna, Inc., 107 IBLA 266 (Feb. 23, 1989)

Public Lands

Pursuant to sec. 3(c) of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1602(e) (1982), BLM may properly exclude from an interim conveyance land which was used seasonally in connection with the administration of a Federal installation during the period of time that the land was available for selection by a Native village corporation, regardless of the amount of use occurring after the appropriate selection period.

Ahtna, Inc., 107 IBLA 266 (Feb. 23, 1989)

APPEALS

GENERALLY

"Service." A notice of appeal from a decision of the Bureau of Land Management must be filed within 30 days after the person taking the appeal is "served" with the decision from which the appeal is taken. Where BLM mails its adverse decision to an address other than the person's last address of record and the decision is returned by the Postal Service because a forwarding order has expired, the decision has not been constructively "served." In these circumstances, an appeal which is subsequently filed within 30 days of the person's receipt of actual notice of the adverse decision is timely.

Jean Emanuel Hatton, Eva M. Pool, Phillip Emanuel, 107 IBLA 47 (Jan. 27, 1989)

A party who is adversely affected by a decision of an officer of BLM may appeal that decision to the Board of Land Appeals. However, a notice of appeal must be filed with BLM within 30 days after the date of service. The timely filing of a notice of appeal is jurisdictional. The failure to file within the time allowed renders the decision final and requires dismissal of the appeal.

Stewart L. Ashton, 107 IBLA 140 (Feb. 6, 1989)

The owner of improvements located on land described in a Native allotment application has standing to protest the allotment application under sec. 905 of the Alaska National Interest Lands Conservation Act, 43 U.S.C. § 1634 (1982). Standing to appeal favorable adjudication of the allotment application and rejection of the protest to the Board of Land Appeals requires a showing of a legally cognizable interest adversely affected by denial of the protest. The interest of a trespasser on the land without claim or color of right will not afford such standing.

Eugene M. Witt, 107 IBLA 229 (Feb. 21, 1989)

APPEALS--Continued

GENERALLY--Continued

The Board will not dismiss as moot an appeal from a BLM decision approving an application for a permit to drill within a designated resource protection zone surrounding units of the Hovenweep National Monument, even though the well has been drilled, plugged, and abandoned, where the appeal presents a significant issue regarding the adequacy of BLM's assessment of the environmental impact of approving the application, and the record indicates the issue is likely to recur within the protection zone.

Colorado Environmental Coalition et al., 108 IBLA 10 (Mar. 20, 1989)

Pursuant to 43 CFR 4.1270(b), a petition for discretionary review of a decision of an Administrative Law Judge disposing of a civil penalty proceeding which is not timely filed must be denied.

Cherry Hill Development v. Office of Surface Mining Reclamation & Enforcement, 108 IBLA 92 (Mar. 28, 1989)

Under 43 CFR 4.410, the timely filing of a notice of appeal is necessary to establish jurisdiction over a matter. Failure to file a timely appeal has the result that a decision becomes final action for the Department, and the Board will not consider the validity of such decisions in a later appeal. The failure to file a timely appeal from decisions declaring mining claims abandoned and void precludes the Board from considering the validity of the claims in an appeal from the rejection of a patent application for those claims.

U. A. Small, 108 IBLA 102 (Mar. 29, 1989)

An Administrative Law Judge does not have authority to limit or cut off appeal rights.

Estate of Paul Widow, 17 IBIA 107 (Apr. 3, 1989)

APPEALS--Continued

GENERALLY--Continued

Where an MMS bill for collection demanding interest on late payments of royalties is challenged by the royalty payor in an appeal to the Director, MMS, solely on the basis that interest was assessed from an improper date, resulting in an overcharge, thereby acquiescing in MMS' authority to assess interest, the Board of Land Appeals, in a subsequent appeal of the Director's decision by that royalty payor, may decline to entertain arguments directed to MMS' authority to assess interest.

ANR Production Co., 108 IBLA 387 (May 22, 1989)

Where the Director, MMS, issues a decision in which he reserves the right to conduct further audits of certain Federal oil and gas leases and processing plants, the royalty payor is not adversely affected and, therefore, lacks standing to appeal that declaration.

Phillips Petroleum Co., 109 IBLA 4 (May 23, 1989)

An appeal will ordinarily be dismissed as moot where, as a result of events occurring after the appeal is filed, there is no effective relief which the Board can afford the appellant.

The Hopi Tribe v. Office of Surface Mining Reclamation & Enforcement, 109 IBLA 374 (June 23, 1989)

Departmental regulation 43 CFR 4.411 provides that a person served with the decision being appealed must transmit the notice of appeal in time for it to be filed in the office where it is required to be filed within 30 days after the date of service. If a decision is published in the Federal Register, a person not served with the decision must transmit a notice of appeal in time for it to be filed within 30 days after the date of publication. If a decision is not published in the Federal Register and an appeal is brought by a person who is not served with the decision, the appellant must establish that he was entitled to personal service of the decision or that his appeal was

APPEALS--Continued

GENERALLY--Continued

filed within 30 days after service of the decision upon the party or parties of record.

Lew Landers, 109 IBLA 391 (June 26, 1989)

The Board of Indian Appeals will not consider issues which an appellant has not pursued on appeal.

W. Woodrow Metzger v. Acting Deputy Ass't Secretary--Indian Affairs (Operations), 17 IBIA 183 (July 12, 1989)

Where, during the pendency of an appeal from a denial of a cultural resource use permit, new regulations are promulgated establishing review procedures for challenging the denial of an application for a cultural resource use permit, the Board may set aside the decision under appeal and remand for application of those procedures.

Jicarilla Archaeological Services, 110 IBLA 57 (July 13, 1989)

A notice of appeal from a decision of the Commissioner of Indian Affairs that is not timely filed will be dismissed.

John D. Baker v. Anadarko Area Director, Bureau of Indian Affairs, 17 IBIA 218 (Aug. 3, 1989)

A mining claimant has standing to appeal from decisions declaring his claims invalid.

The failure to file a timely appeal from a decision by an Administrative Law Judge in a private contest declaring mining claims invalid precludes the Board from considering the contestee's appeal from the denial of a later protest to the extent that the appeal involves issues resolved in the contest decision.

Melvin Helit, A-Able Plumbing, Inc., 110 IBLA 144 (Aug. 10, 1989)

APPEALS--Continued

GENERALLY--Continued

When the Board conducts de novo review of a decision of an Administrative Law Judge who erroneously allocated the burden of proof in a private contest proceeding to the applicant for a Native allotment rather than to the contestant, the Board properly reviews the entire record to determine whether the applicant established by a preponderance of the evidence that he satisfactorily proved he was entitled to an allotment.

Ira Wassillie (On Reconsideration), 111 IBLA 53 (Sept. 20, 1989)

A party is not required to appeal from a BLM letter which does not adversely affect it, is informative in nature, and does not set forth appeal rights.

Chevron U.S.A. Inc., 111 IBLA 96 (Sept. 28, 1989)

JURISDICTION

An administrative appeal must be filed within 30 days of receipt of the decision from which an appeal is taken. 43 CFR 411. The timely filing of an administrative appeal is jurisdictional and the failure to file timely mandates dismissal of the appeal.

D. R. Johnson Lumber Co., 106 IBLA 379 (Jan. 19, 1989)

The Board of Land Appeals does not have jurisdiction to review appeals of decisions to approve or amend a resource management plan. Because a resource management plan establishes management policy, its approval is subject only to protest to the Director of the Bureau of Land Management, whose decision is final for the Department. Nor does the Board possess authority to review land classification determinations made by BLM. However, actions on applications following classification of land and decisions which implement a management plan or amendment are appealable to the Board.

The Desert Tortoise Habitat Management Plan is a document designed to guide and control future management actions and does not take specific action

APPEALS--Continued

JURISDICTION--Continued

or implement a decision or action. The "management actions" it identifies are not the type of specific actions or land-use decisions which are appealable to the Board.

California Ass'n of Four Wheel Drive Clubs, Inc., 108 IBLA 140 (Apr. 3, 1989)

The Board of Land Appeals does not have jurisdiction to review appeals of decisions to approve or amend a resource management plan or land classification determinations rendered by BLM. Because a resource management plan establishes management policy, its approval is subject only to protest to the Director, BLM, whose decision is final for the Department. On the other hand, actions on applications following classification of land and decisions which implement a resource management plan or amendment are appealable to the Board.

The Wilderness Society, 109 IBLA 175 (June 9, 1989)

The time for filing a request for a hearing with respect to issuance of a surface mining permit under sec. 514(c) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1264(c) (1982), is limited by the terms of the statute and the regulation at 30 CFR 775.11(a) to 30 days from the time the applicant is notified of the decision of the regulatory authority on the permit application. The timely filing of a request for hearing is essential to establish the jurisdiction of the Office of Hearings and Appeals to review a permit decision and a decision dismissing the appeal will be affirmed where it appears from the record that the request was not filed within the time limit.

The Hopi Tribe v. Office of Surface Mining Reclamation & Enforcement, 109 IBLA 374 (June 23, 1989)

APPEALS--Continued

JURISDICTION--Continued

Pursuant to 30 CFR 290.7 any party adversely affected by a final decision of the Director, Minerals Management Service, may file an appeal with the Board. Where the issues raised before the Board were not raised before the Director, the appeal must be dismissed for lack of jurisdiction.

ANR Production Co., 110 IBLA 127 (Aug. 8, 1989)

The Board has no jurisdiction to adjudicate the propriety of a survey conducted by or on behalf of the Forest Service or of decisions by the Forest Service accepting such survey. However, such surveys do not constitute official surveys of the public lands of the United States, as the authority to conduct such surveys and resurveys is vested solely in the Secretary of the Interior, who in turn has delegated this authority to BLM. Thus, a Forest Service survey does not effect any change in the location of a corner, but is merely an administrative survey which the Forest Service uses in managing the National Forests.

Wilogene Simpson et al., 110 IBLA 271 (Sept. 13, 1989)

APPLICATIONS AND ENTRIES

GENERALLY

Under the preliminary injunction order issued in Nat'l Wildlife Federation v. Burford, Civ. No. 85-2238 (D.D.C. Feb. 10, 1986), BLM was precluded from terminating powersite classifications and restoring lands described in a desert land entry application.

James A. Malesky (On Reconsideration), 106 IBLA 327 (Jan. 9, 1989)

APPLICATIONS AND ENTRIES--Continued

GENERALLY--Continued

Upon issuance of a final certificate of mineral entry for mining claims, the lands encompassed by the claims are closed to mineral entry by another person, and any claims located thereafter on the lands covered by the final certificate are null and void ab initio.

Melvin Helit, A-Able Plumbing, Inc., 110 IBLA 144 (Aug. 10, 1989)

RELINQUISHMENT

Generally, BLM has the duty to examine whether a relinquishment of a Native allotment application was knowing and voluntary when the applicant declares it was not. However, where the evidence submitted by the applicant clearly shows, as a matter of law, the invalidity of the claim, it is unnecessary to conduct a factual investigation of the circumstances of the relinquishment.

Jonas Ningeok, 109 IBLA 347 (June 23, 1989)

APPRAISALS

BLM properly holds a communications site right-of-way grant for termination where the holder failed to pay the annual rental charges for the first and second years of the grant within 30 days following notification of BLM's determination of the fair market value of the grant for those years.

D. R. Johnson Lumber Co., 106 IBLA 379 (Jan. 19, 1989)

Where BLM adjusts the annual rental for a telecommunications site right-of-way based on the comparable lease method of valuation and, following an informal hearing on the appraisal, abandons the appraisal in favor of a market data study of telecommunication site annual rental values, the decision establishing the rental on the basis of the market data study will be vacated and remanded for reappraisal, where the market study did not fully identify the lease transactions relied upon and BLM provided no analysis of how the right-of-way being

APPRAISALS--Continued

appraised compared to any particular information in the market study.

Mountain States Telephone & Telegraph Co., 107 IBLA 82 (Jan. 31, 1989)

Where BLM has set the annual rental charges for a communications site right-of-way based on an appraisal of the fair market rental value of that site which failed, without adequate justification, to consider a comparable lease of arguable significance, the Board will set aside the decision setting the rental charges and remand for a reappraisal and any necessary recalculation of such charges.

Richard Boulais, dba Private Line Communications, 107 IBLA 109 (Feb. 2, 1989)

The role of the Board of Indian Appeals in reviewing a Bureau of Indian Affairs determination of fair market value in connection with the taking of a road right-of-way over Indian land is to determine whether the decision is reasonable; that is, whether it is supported by law and substantial evidence.

When private property is taken by the United States, just compensation payable to the landowner is properly reduced by the value of benefits accruing to the landowner's remaining property as a result of the taking.

Utu Utu Gwaitu Paiute Tribe of the Benton Paiute Reservation v. Area Director, Sacramento Area Office, Bureau of Indian Affairs, 17 IBIA 78 (Feb. 22, 1989)

An appraisal of fair market rental value for a communication site right-of-way will not be set aside on appeal if an appellant fails to show error in the appraisal methods used or fails to show by convincing evidence that the charges are excessive. In the absence of a preponderance of evidence that a BLM appraisal is erroneous, such an appraisal may be rebutted only by another appraisal.

Chalfont Communications, 108 IBLA 195 (Apr. 13, 1989)

APPRAISALS--Continued

Big Sky Communications, Inc., 110 IBLA 213 (Aug. 21, 1989)

An appraisal of the fair market rental value of a right-of-way for a communications site may be set aside and remanded where the appraisal report provides insufficient data on leases compared and insufficient analysis of the differences and similarities between the comparable leases and the subject lease to support the appraisal.

Mountain States Telephone & Telegraph Co., 109 IBLA 142 (June 8, 1989)

A BLM appraisal of a right-of-way for a compressor station will be affirmed on appeal where the right-of-way holder has not demonstrated that it was error for BLM to use a market survey of comparable transactions involving the issuance of private rights-of-way rather than the fee schedule for linear rights-of-way or the "before and after" appraisal method.

Colorado Interstate Gas Co., 110 IBLA 171 (Aug. 14, 1989)

A Bureau of Indian Affairs appraisal of tribal timber resources conducted for the purpose of evaluating proposed stumpage rates will not be overturned unless it is shown to be unreasonable.

White Mountain Apache Tribe dba Fort Apache Timber Co. v. Deputy Ass't Secretary--Indian Affairs (Operations), 17 IBIA 258 (Aug. 25, 1989)

The regulations at 43 CFR 2801.4 provide that a right-of-way grant issued on or before Oct. 21, 1976, shall be covered by the regulations in 43 CFR Part 2800. In turn, 43 CFR 2803.1-2(c)(1) provides, with limited exceptions, that an annual rental payment must be submitted in accordance with the per-acre rental schedule set out therein. A proposed per-acre rental schedule by state, county, and type of linear right-of-way use was published in the Federal Register, and comments were sought. The final rules, also published in the Federal Register, set out a county-by-county rental

APPRAISALS--Continued

schedule. Rules and regulations reasonably adapted to the administration of a congressional act, not inconsistent with any statute, have the force and effect of law, and this Board has no authority to declare such rules and regulations invalid. There being no showing that the Department exceeded its statutory authority when setting the rental rate, this Board is obligated to accept the use of those rates. BLM's decision to use rate zones and its use of the rental schedule as the basis for calculating the rental obligations were proper.

When setting the yearly rentals for existing linear rights-of-way not previously subject to the rental schedule set out at 43 CFR 2803.1-2(c)(1)(i), the regulatory provisions found at 43 CFR 2803.1-2(c)(2)(ii) require a rental adjustment if the new rental exceeds $100 and is more than a 100-percent increase over the current rental. The amount of the increase in excess of the 100-percent increase must be phased in by equal increments, plus the annual adjustment, over a 3-year period. A BLM decision establishing a new rental rate for a linear right-of-way, and using the rate schedule for the first time, will be set aside and remanded if BLM fails to phase in the amount of the rental increase in excess of 100 percent of the current rental pursuant to 43 CFR 2803.1-2(c)(2)(ii).

Tucson Electric Power Co., 111 IBLA 69 (Sept. 22, 1989)

ATTORNEY'S FEES

CONTRACT DISPUTES ACT OF 1978

The Government's position in denying a claim for overrun costs under a cost-plus-fixed-fee contract is found not to be substantially justified within the meaning of EAJA in regard to a claim on which the appellant prevailed where the Board finds that for the most part the arguments made by the Government in the Opposition filed to the EAJA application are identical in all material respects to the arguments made in the Government's posthearing brief and that such arguments and other arguments made by the Government in the

ATTORNEY'S FEES--Continued

CONTRACT DISPUTES ACT OF 1978--Continued

Opposition had been considered and rejected in the underlying decision either explicitly or by implication.

Salisbury & Dietz, Inc. (Application for Attorney Fees), IBCA-2382-F (June 23, 1989) 96 I.D. 280

EQUAL ACCESS TO JUSTICE ACT

Application and Jurisdiction

By regulation, the Department has interpreted the Equal Access to Justice Act to exclude all proceedings except those required by statute to be conducted under 5 U.S.C. § 554 (1982).

Utu Utu Gwaitu Paiute Tribe of the Benton Paiute Reservation v. Sacramento Area Director, Bureau of Indian Affairs, 17 IBIA 141 (June 19, 1989)

Prevailing Party

The Government's position in denying a claim for overrun costs under a cost-plus-fixed-fee contract is found not to be substantially justified within the meaning of EAJA in regard to a claim on which the appellant prevailed where the Board finds that for the most part the arguments made by the Government in the Opposition filed to the EAJA application are identical in all material respects to the arguments made in the Government's posthearing brief and that such arguments and other arguments made by the Government in the Opposition had been considered and rejected in the underlying decision either explicitly or by implication.

Salisbury & Dietz, Inc. (Application for Attorney Fees), IBCA-2382-F (June 23, 1989) 96 I.D. 280

Substantially Justified

The Government's position in denying a claim for overrun costs under a cost-plus-fixed-fee contract is found not to be substantially justified within the meaning of EAJA in regard to a claim on which the appellant prevailed where the Board finds that for the most part the arguments made by the Government in the

ATTORNEY'S FEES--Continued

EQUAL ACCESS TO JUSTICE ACT--Continued

Substantially Justified--Continued

Opposition filed to the EAJA application are identical in all material respects to the arguments made in the Government's posthearing brief and that such arguments and other arguments made by the Government in the Opposition had been considered and rejected in the underlying decision either explicitly or by implication.

Salisbury & Dietz, Inc. (Application for Attorney Fees), IBCA-2382-F (June 23, 1989) 96 I.D. 280

ATTORNEYS

"Last address of record." In the processing of an application for assignment of a coal lease, the last address of record for the purposes of 43 CFR 1810.2(b) is the address stated on the application unless the applicant or an authorized representative has filed written notice of a change of address. When an application is accompanied by a letter from the applicant's attorney which states that the attorney is to be contacted concerning certain matters, the attorney's address is the "last address of record," and delivery of a document to that address constitutes service of the document upon the applicant, regardless of whether it was actually received by the attorney. Where the address provided by the attorney does not specify a suite, office number, or floor, "delivery" of the document is accomplished when it is received in the building indicated in the address.

5M, Inc., 109 IBLA 334 (June 22, 1989)

BOARD OF INDIAN APPEALS

GENERALLY

The Board of Indian Appeals will not consider the merits of a moot appeal where there is no showing that it involves a potentially recurring question raised by

BOARD OF INDIAN APPEALS--Continued

GENERALLY--Continued

a short-term order, capable of repetition, yet evading review.

The Board of Indian Appeals undertakes to interpret tribal law only where there is a clear necessity for it to do so.

Herschel Sahmaunt et al. v. Area Director, Anadarko Area Office, Bureau of Indian Affairs, 17 IBIA 60 (Jan. 30, 1989)

JURISDICTION

The Board of Indian Appeals has jurisdiction over decisions issued by Bureau of Indian Affairs officials under 25 CFR Chapter I. It does not have jurisdiction over decisions made by duly constituted tribal officials or governing bodies.

Anna Thompson et al. v. Area Director, Eastern Area Office, Bureau of Indian Affairs, 17 IBIA 39 (Jan. 23, 1989)

Under 25 CFR 88.1(c), a decision of a Bureau of Indian Affairs Area Director approving, disapproving, or conditionally approving a tribal attorney contract is final for the Department and is not subject to appeal with the Department.

Ronald T. Welch et al. v. Area Director, Minneapolis Area Office, Bureau of Indian Affairs, 17 IBIA 56 (Jan. 30, 1989)

The Board of Indian Appeals does not have authority to declare invalid a duly promulgated Departmental regulation.

Joint Board of Control for the Flathead, Mission, & Jocko Irrigation Districts v. Area Director, Portland Area Office, Bureau of Indian Affairs, 17 IBIA 65 (Feb. 15, 1989)

Utu Utu Gwaitu Paiute Tribe of the Benton Paiute Reservation v. Sacramento Area Director, Bureau of Indian Affairs, 17 IBIA 141 (June 19, 1989)

BOARD OF INDIAN APPEALS--Continued

JURISDICTION--Continued

The Board of Indian Appeals lacks authority to review a decision of a Bureau of Indian Affairs official insofar as it is based on the exercise of discretion. However, the Board has authority to determine whether proper procedures were followed in reaching the decision.

Angelita Aunko Hamilton v. Acting Anadarko Area Director, Bureau of Indian Affairs, 17 IBIA 152 (June 21, 1989)

The decision whether to acquire land in trust status for an Indian tribe or individual is committed to the discretion of the Bureau of Indian Affairs. In reviewing such a decision, it is not the function of the Board of Indian Appeals to substitute its judgment for that of the Bureau. Rather, it is the Board's responsibility to ensure that proper consideration was given to all legal prerequisites to the exercise of discretion.

City of Eagle Butte, South Dakota v. Aberdeen Area Director, Bureau of Indian Affairs, 17 IBIA 192 (July 25, 1989) 96 I.D. 328

Naomi Haikey Eades v. Muskogee Area Director, Bureau of Indian Affairs, 17 IBIA 198 (July 26, 1989)

Day County, South Dakota v. Aberdeen Area Director, Bureau of Indian Affairs, 17 IBIA 204 (July 26, 1989)

Roberta C. Weckeah Bradley v. Anadarko Area Director, Bureau of Indian Affairs, 17 IBIA 210 (Aug. 2, 1989)

The Board of Indian Appeals is not a court of general jurisdiction and has only those powers delegated to it by the Secretary of the Interior. It has not been delegated authority to award money damages against officials of the Bureau of Indian Affairs for their incorrect interpretation of regulations.

Esthervon (Kee) Spencer v. Navajo Area Director, Bureau of Indian Affairs, 17 IBIA 226 (Aug. 17, 1989)

BOARD OF INDIAN APPEALS--Continued

JURISDICTION--Continued

The determination whether to approve stumpage rates under a timber sale contract between a tribe and its tribal forest enterprise is committed to the discretion of the Bureau of Indian Affairs. In reviewing such a decision, it is not the function of the Board of Indian Appeals to substitute its judgment for that of the Bureau. Rather, it is the Board's responsibility to ensure that proper consideration was given to all legal prerequisites to the exercise of discretion.

White Mountain Apache Tribe dba Fort Apache Timber Co. v. Deputy Ass't Secretary--Indian Affairs (Operations), 17 IBIA 258 (Aug. 25, 1989)

The appeal procedures in 25 CFR Part 2 do not apply to the protest of an award of a Federal procurement contract by a Bureau of Indian Affairs contracting officer, because procedures for such protests are set out in the Federal Acquisition Regulations, 48 CFR Parts 33.1 and 1433.1. The Board of Indian Appeals lacks jurisdiction over such protests.

United Sioux Tribes Development Corp. v. Aberdeen Area Director, Bureau of Indian Affairs, 17 IBIA 286 (Sept. 14, 1989)

Approval of conveyances of Indian trust or restricted land is committed to the discretion of the Bureau of Indian Affairs. In reviewing such approvals, it is not the function of the Board of Indian Appeals to substitute its judgment for that of the Bureau. Rather, it is the Board's responsibility to ensure that proper consideration has been given to all legal prerequisites to the exercise of discretion.

Franklin Escalanti v. Acting Phoenix Area Director, Bureau of Indian Affairs, 17 IBIA 290 (Sept. 15, 1989)

BOARD OF INDIAN APPEALS--Continued

JURISDICTION--Continued

25 CFR 162.5(b)(2) vests the Secretary with discretion to approve the lease of tribal land to the Bureau of Indian Affairs, inter alia, at a nominal rental. In light of this regulatory provision, the decision whether the Bureau should pay fair market value to lease tribal land is committed to the Bureau's discretion. In reviewing such decisions, it is not the function of the Board of Indian Appeals to substitute its judgment for that of the Bureau. Rather, it is the Board's responsibility to ensure that proper consideration has been given to all legal prerequisites to the exercise of discretion.

San Carlos Apache Tribe v. Acting Phoenix Area Director, Bureau of Indian Affairs, 17 IBIA 299 (Sept. 21, 1989)

BOARD OF LAND APPEALS

The Board of Land Appeals does not have jurisdiction to review appeals of decisions to approve or amend a resource management plan. Because a resource management plan establishes management policy, its approval is subject only to protest to the Director of the Bureau of Land Management, whose decision is final for the Department. Nor does the Board possess authority to review land classification determinations made by BLM. However, actions on applications following classification of land and decisions which implement a management plan or amendment are appealable to the Board.

The Desert Tortoise Habitat Management Plan is a document designed to guide and control future management actions and does not take specific action or implement a decision or action. The "management actions" it identifies are not the type of specific actions or land-use decisions which are appealable to the Board.

California Ass'n of Four Wheel Drive Clubs, Inc., 108 IBLA 140 (Apr. 3, 1989)

BOARD OF LAND APPEALS--Continued

The Board of Land Appeals does not have jurisdiction to review appeals of decisions to approve or amend a resource management plan or land classification determinations rendered by BLM. Because a resource management plan establishes management policy, its approval is subject only to protest to the Director, BLM, whose decision is final for the Department. On the other hand, actions on applications following classification of land and decisions which implement a resource management plan or amendment are appealable to the Board.

The Wilderness Society, 109 IBLA 175 (June 9, 1989)

Where at the time of permit approval under a Federal lands program in a state without a cooperative agreement, OSMRE conditions permit approval on a state regulatory program regulation regarding subsidence control, such a condition is proper and this Board has no jurisdiction to entertain an argument that the regulation is more stringent than standards required by the Surface Mining Control and Reclamation Act of 1977, and, therefore, unenforceable under state law.

Old Ben Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 109 IBLA 362 (June 23, 1989)

The Board has no jurisdiction to adjudicate the propriety of a survey conducted by or on behalf of the Forest Service or of decisions by the Forest Service accepting such survey. However, such surveys do not constitute official surveys of the public lands of the United States, as the authority to conduct such surveys and resurveys is vested solely in the Secretary of the Interior, who in turn has delegated this authority to BLM. Thus, a Forest Service survey does not effect any change in the location of a corner, but is merely an administrative survey which the Forest Service uses in managing the National Forests.

Wilogene Simpson et al., 110 IBLA 271 (Sept. 13, 1989)

BOARD OF LAND APPEALS--Continued

When it appears an applicant for a Native allotment may not have presented satisfactory proof of his substantially continuous use and occupancy of the land for a period of 5 years, the Board may, in the absence of legislative approval, review the record and act to prevent the mistaken issuance of a patent to the land to one not entitled to it, even if the Bureau of Land Management has already approved the application.

Ira Wassillie (On Reconsideration), 111 IBLA 53 (Sept. 20, 1989)

BUREAU OF INDIAN AFFAIRS

GENERALLY

The Department of the Interior has authority to interpret a tribal constitution with respect to the Secretary's ordinance approval role under the constitution.

The Secretary of the Interior may delegate to subordinate officials the authority to approve tribal ordinances granted to him in tribal constitutions.

Fort McDermitt Paiute Shoshone Tribe v. Acting Phoenix Area Director, Bureau of Indian Affairs, 17 IBIA 144 (June 21, 1989)

ADMINISTRATIVE APPEALS

Generally

Under 25 CFR 88.1(c), a decision of a Bureau of Indian Affairs Area Director approving, disapproving, or conditionally approving a tribal attorney contract is final for the Department and is not subject to appeal with the Department.

Ronald T. Welch et al. v. Area Director, Minneapolis Area Office, Bureau of Indian Affairs, 17 IBIA 56 (Jan. 30, 1989)

BUREAU OF INDIAN AFFAIRS--Continued

ADMINISTRATIVE APPEALS--Continued

Generally--Continued

The appeal procedures in 25 CFR Part 2 do not apply to the protest of an award of a Federal procurement contract by a Bureau of Indian Affairs contracting officer, because procedures for such protests are set out in the Federal Acquisition Regulations, 48 CFR Parts 33.1 and 1433.1. The Board of Indian Appeals lacks jurisdiction over such protests.

United Sioux Tribes Development Corp. v. Aberdeen Area Director, Bureau of Indian Affairs, 17 IBIA 286 (Sept. 14, 1989)

Acts of Agents of the United States

Unauthorized acts by an employee of the Bureau of Indian Affairs cannot serve as the basis for conferring rights not authorized by law.

Roberta C. Weckeah Bradley v. Anadarko Area Director, Bureau of Indian Affairs, 17 IBIA 210 (Aug. 2, 1989)

Discretionary Decisions

Under 25 U.S.C. § 1463 (1982), the decision whether to approve a loan from the Indian Revolving Loan Fund is a decision requiring the exercise of discretion.

The Board of Indian Appeals lacks authority to review a decision of a Bureau of Indian Affairs official insofar as it is based on the exercise of discretion. However, the Board has authority to determine whether proper procedures were followed in reaching the decision.

Angelita Aunko Hamilton v. Acting Anadarko Area Director, Bureau of Indian Affairs, 17 IBIA 152 (June 21, 1989)

BUREAU OF INDIAN AFFAIRS--Continued

ADMINISTRATIVE APPEALS--Continued

Filing

Mandatory Time Limit

Regulations promulgated by the Bureau of Indian Affairs in 25 CFR 2.10 establish a 30-day period for filing notices of appeal.

Francis Cahoon v. Portland Area Director, Bureau of Indian Affairs, 17 IBIA 187 (July 18, 1989)

A notice of appeal from a decision of the Commissioner of Indian Affairs that is not timely filed will be dismissed.

John D. Baker v. Anadarko Area Director, Bureau of Indian Affairs, 17 IBIA 218 (Aug. 3, 1989)

Leases

25 CFR 162.5(b)(2) vests the Secretary with discretion to approve the lease of tribal land to the Bureau of Indian Affairs, inter alia, at a nominal rental. In light of this regulatory provision, the decision whether the Bureau should pay fair market value to lease tribal land is committed to the Bureau's discretion. In reviewing such decisions, it is not the function of the Board of Indian Appeals to substitute its judgment for that of the Bureau. Rather, it is the Board's responsibility to ensure that proper consideration has been given to all legal prerequisites to the exercise of discretion.

San Carlos Apache Tribe v. Acting Phoenix Area Director, Bureau of Indian Affairs, 17 IBIA 299 (Sept. 21, 1989)

CLASSIFICATION AND MULTIPLE USE ACT OF 1964

Where a Federal district court issues a preliminary injunction which has the effect of suspending the termination of a multiple-use classification which segregated the land from mineral entry, thereby reinstating the terms of the classification, a mining claim

subsequently located on land subject to that injunction is properly declared null and void ab initio.

Art Marinaccio, 107 IBLA 303 (Mar. 2, 1989)

COAL LEASES AND PERMITS

GENERALLY

Under 43 CFR 3453.3-1(a) and 3472.1-2(e)(1), where parties have held a Federal coal lease for 10 years from which they were not producing the coal deposits in commercial quantities, in the absence of extraordinary circumstances concerning the failure to produce coal on this lease, BLM is prohibited from approving an assignment transferring an interest in any existing Federal coal lease to them. Under 43 CFR 3472.1-2(e)(1)(ii), an entity seeking to obtain approval of a transfer must qualify on the date the transfer is disapproved. Where the parties did not qualify for the assignment at the time BLM considered their application for approval of assignment, BLM properly disapproves the application.

The requirement that a coal lease be "diligently developed" on pain of termination is not equivalent to the restriction imposed by 43 CFR 3472.1-2(e)(1)(i) on transfer of lease interests to lessees with other Federal coal leases that they have held in excess of 10 years without producing the coal deposits "in commercial quantities." It is irrelevant to the application of 43 CFR 3472.1-2(e)(1)(i) when and whether the holders of a lease not producing coal deposits in commercial quantities might also be required to accomplish "diligent development" of that lease.

The Board of Land Appeals has no authority to declare invalid duly promulgated regulations of the Department; such regulations have the force and effect of law and are binding on the Department. Sec. 3472.1-2(e) of 43 CFR was "duly promulgated" and, accordingly, has binding force and effect of law. Further, this provision is amply authorized by relevant provisions of the Mineral Leasing Act.

The intent of the proviso in a Federal coal lease that it is "pursuant and subject to the terms and provisions of the [Mineral Leasing Act], and to all reasonable regulations of the Secretary of the Interior, now or hereafter in force which are made a

COAL LEASES AND PERMITS--Continued

GENERALLY--Continued

part hereof" is to incorporate future regulations, even though inconsistent with those in effect at the time of execution of the lease under the Mineral Leasing Act, and even though to do so creates additional obligations or burdens for the lessee. The implementation of the burden imposed by 43 CFR 3472.1-2(e)(1)(i) is consistent with the enforcement of the congressionally imposed obligation to develop Federal coal leases.

Veola & Aaron Rasmussen, 109 IBLA 106 (June 7, 1989)

BLM properly increases the bond for a coal lease in accordance with appropriate Departmental guidelines where the lease goes from a nonproducing to a producing status, regardless of whether such production constitutes full development of the leased land.

United States Fuel Co., 109 IBLA 398 (June 27, 1989)

The Board of Land Appeals has no authority to declare invalid duly promulgated regulations of this Department. Such regulations have the force and effect of law and are binding on the Department.

If the record contains conflicting BLM calculations of recoverable coal reserves existing on the lease at the time the lease became subject to the due diligence requirement, and BLM has failed to explain its decision to use an earlier, higher estimate of recoverable reserves rather than a subsequent, lower estimate for calculating the production rate necessary to satisfy the continued operation requirement, BLM's calculations will be set aside, and the case will be remanded for further consideration of the recoverable coal reserves estimate.

Coastal States Energy Co., 110 IBLA 179 (Aug. 15, 1989)

COAL LEASES AND PERMITS--Continued

APPLICATIONS

"Last address of record." In the processing of an application for assignment of a coal lease, the last address of record for the purposes of 43 CFR 1810.2(b) is the address stated on the application unless the applicant or an authorized representative has filed written notice of a change of address. When an application is accompanied by a letter from the applicant's attorney which states that the attorney is to be contacted concerning certain matters, the attorney's address is the "last address of record," and delivery of a document to that address constitutes service of the document upon the applicant, regardless of whether it was actually received by the attorney. Where the address provided by the attorney does not specify a suite, office number, or floor, "delivery" of the document is accomplished when it is received in the building indicated in the address.

5M, Inc., 109 IBLA 334 (June 22, 1989)

LEASES

The 20-year readjustment interval stated in coal leases issued prior to enactment of the Federal Coal Leasing Amendments Act of Aug. 4, 1976, 30 U.S.C. §§ 201, 209 (1982), was converted to a 10-year readjustment interval by that Act. Although a failure to provide timely notice of readjustment at the end of a 20-year period is treated as a Departmental waiver of its right to impose new or additional terms and conditions, this waiver does not extend to the period between readjustments set by the Act, and a lease may be readjusted at the end of the next 10-year readjustment period.

Wyodak Resources Development Corp., 106 IBLA 339 (Jan. 12, 1989)

Where offeror who has held a coal lease in excess of 10 years seeks to qualify for exemption from Federal Coal Leasing Amendments Act amendments to the Mineral Leasing Act requiring production from offeror's coal lease in commercial quantities, and claims that its

COAL LEASES AND PERMITS--Continued

LEASES--Continued

lease is under application for a logical mining unit, offeror must show that its logical mining unit application was pending at the time the oil and gas offer to lease was rejected.

Under 1976 Federal Coal Leasing Amendments Act amendments to the Mineral Leasing Act requiring coal lessees who have held leases for a period of 10 years to produce coal in commercial quantities in order to qualify for other Federal leases, where coal lessee offers to bid on other Federal leases pursuant to the Mineral Leasing Act, terms and conditions of offeror's coal lease or leases are subject to the qualifying provision of 30 U.S.C. § 201(a)(2)(A) (1982), insofar as the lessee seeks to qualify to hold other Federal leases.

GeoResources, Inc., 107 IBLA 311 (Mar. 2, 1989)
96 I.D. 77

Any coal lease issued prior to enactment of sec. 6 of the Federal Coal Leasing Amendments Act of 1976, 30 U.S.C. § 207 (1982), whose 20-year readjustment period expires after Aug. 4, 1976, is automatically converted at that time to a 10-year readjustment interval.

Employees of the executive branch, including BLM, have no authority to depart from the requirements of statutes dealing with public lands. All citizens are deemed to have knowledge of such statutes. Thus, even though a coal lessee was erroneously advised by BLM that his coal lease would be subject to readjustment in 1999 rather than in 1989, the Government is not estopped from readjusting the lease in 1989 as provided by statute.

Chevron U.S.A., Inc., The Pittsburgh & Midway Coal Mining Co., 108 IBLA 96 (Mar. 29, 1989)

COAL LEASES AND PERMITS--Continued

LEASES--Continued

As a general rule, rental payments on coal leases issued prior to enactment of the Federal Coal Leasing Amendments Act of 1976 may be credited against royalties due on production until the lease terms are readjusted.

The Department has provided by regulation that the terms of a Federal coal lease committed to an LMU, except for the royalty rate, shall be amended to be consistent with the stipulations of the LMU. The Department is bound by its regulations and a decision effectively amending the royalty rate by barring a credit of rental against royalty for a pre-Federal Coal Leasing Amendments Act lease committed to an LMU will be reversed as unsupported by the regulation.

Under sec. 203 of the Mineral Leasing Act, modification of a coal lease by including additional coal lands may be approved by the Secretary upon a finding that it would be "in the interest of the United States." A decision rejecting an application for modification of a coal lease will be affirmed on appeal where it appears that approval of the application is not in the public interest.

Black Butte Coal Co., et al., 109 IBLA 254 (June 16, 1989)

READJUSTMENT

The 20-year readjustment interval stated in coal leases issued prior to enactment of the Federal Coal Leasing Amendments Act of Aug. 4, 1976, 30 U.S.C. §§ 201, 209 (1982), was converted to a 10-year readjustment interval by that Act. Although a failure to provide timely notice of readjustment at the end of a 20-year period is treated as a Departmental waiver of its right to impose new or additional terms and conditions, this waiver does not extend to the period between readjustments set by the Act, and a lease may be readjusted at the end of the next 10-year readjustment period.

Wyodak Resources Development Corp., 106 IBLA 339 (Jan. 12, 1989)

COAL LEASES AND PERMITS--Continued

READJUSTMENT--Continued

Any coal lease issued prior to enactment of sec. 6 of the Federal Coal Leasing Amendments Act of 1976, 30 U.S.C. § 207 (1982), whose 20-year readjustment period expires after Aug. 4, 1976, is automatically converted at that time to a 10-year readjustment interval.

Employees of the executive branch, including BLM, have no authority to depart from the requirements of statutes dealing with public lands. All citizens are deemed to have knowledge of such statutes. Thus, even though a coal lessee was erroneously advised by BLM that his coal lease would be subject to readjustment in 1999 rather than in 1989, the Government is not estopped from readjusting the lease in 1989 as provided by statute.

Chevron U.S.A., Inc., The Pittsburgh & Midway Coal Mining Co., 108 IBLA 96 (Mar. 29, 1989)

As a general rule, rental payments on coal leases issued prior to enactment of the Federal Coal Leasing Amendments Act of 1976 may be credited against royalties due on production until the lease terms are readjusted.

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Black Butte Coal Co., et al., 109 IBLA 254 (June 16, 1989)

RENTALS

As a general rule, rental payments on coal leases issued prior to enactment of the Federal Coal Leasing

COAL LEASES AND PERMITS--Continued

RENTALS--Continued

Amendments Act of 1976 may be credited against royalties due on production until the lease terms are readjusted.

The Department has provided by regulation that the terms of a Federal coal lease committed to an LMU, except for the royalty rate, shall be amended to be consistent with the stipulations of the LMU. The Department is bound by its regulations and a decision effectively amending the royalty rate by barring a credit of rental against royalty for a pre-Federal Coal Leasing Amendments Act lease committed to an LMU will be reversed as unsupported by the regulation.

Black Butte Coal Co., et al., 109 IBLA 254 (June 16, 1989)

ROYALTIES

Where MMS imposes late payment charges in accordance with 30 CFR 218.200(a) (1986), a coal lessee may not invoke the estimated payment exception in that regulation when there is no evidence that the lessee sought prior authorization from MMS to make estimated payments.

Estoppel will not lie against the Government to preclude collection of late payment charges where a coal lessee allegedly makes royalty payments based on the erroneous advice of a Government employee concerning the royalty rate, but the record shows that the lessee was not ignorant of the true facts concerning the effective date of a new royalty rate.

Utah International, Inc., 107 IBLA 217 (Feb. 21, 1989)

As a general rule, rental payments on coal leases issued prior to enactment of the Federal Coal Leasing Amendments Act of 1976 may be credited against royalties due on production until the lease terms are readjusted.

The Department has provided by regulation that the terms of a Federal coal lease committed to an LMU, except for the royalty rate, shall be amended to be consistent with the stipulations of the LMU. The Department is bound by its regulations and a decision

COAL LEASES AND PERMITS--Continued

ROYALTIES--Continued

effectively amending the royalty rate by barring a credit of rental against royalty for a pre-Federal Coal Leasing Amendments Act lease committed to an LMU will be reversed as unsupported by the regulation.

Black Butte Coal Co., et al., 109 IBLA 254 (June 16, 1989)

Sec. 6 of the Federal Coal Leasing Amendments Act of 1976, 30 U.S.C. § 207(b) (1982), requires continued operation of a lease that has achieved diligent development. However, the requirement may be suspended upon application and payment of advance royalties. The failure to make advance royalty payments in lieu of continued operation subjects the lease to cancellation.

Coastal States Energy Co., 110 IBLA 179 (Aug. 15, 1989)

COLOR OR CLAIM OF TITLE

GENERALLY

A class I color-of-title claim must be based upon a document which, on its face, purports to convey the claimed land to claimant or his predecessor. Where the only evidence of conveyance is a bill of sale conveying a cabin located on the claimed land, a color-of-title application is properly rejected.

Louis Mark Mannatt, 109 IBLA 100 (June 5, 1989)

ADVERSE POSSESSION

An applicant for a class I color-of-title claim must show peaceful adverse possession of the claimed lands for a period of at least 20 years. Mere occupancy of public lands and the making of improvements thereon give rise to no vested rights against the United States, absent some colorable claim of right of possession.

Louis Mark Mannatt, 109 IBLA 100 (June 5, 1989)

COLOR OR CLAIM OF TITLE--Continued

APPLICATIONS

A class I color-of-title claim must be based upon a document which, on its face, purports to convey the claimed land to claimant or his predecessor. Where the only evidence of conveyance is a bill of sale conveying a cabin located on the claimed land, a color-of-title application is properly rejected.

An applicant for a color-of-title claim must show good faith possession of the land. Where the applicant has previously sought to lease part of the land from the United States, that action constitutes acknowledgment of Federal ownership which negates good faith.

An applicant for a class I color-of-title claim must show peaceful adverse possession of the claimed lands for a period of at least 20 years. Mere occupancy of public lands and the making of improvements thereon give rise to no vested rights against the United States, absent some colorable claim of right of possession.

Louis Mark Mannatt, 109 IBLA 100 (June 5, 1989)

GOOD FAITH

An applicant for a color-of-title claim must show good faith possession of the land. Where the applicant has previously sought to lease part of the land from the United States, that action constitutes acknowledgment of Federal ownership which negates good faith.

Louis Mark Mannatt, 109 IBLA 100 (June 5, 1989)

COMMUNICATION SITES

BLM properly holds a communications site right-of-way grant for termination where the holder failed to pay the annual rental charges for the first and second years of the grant within 30 days following notification of BLM's determination of the fair market value of the grant for those years.

D. R. Johnson Lumber Co., 106 IBLA 379 (Jan. 19, 1989)

COMMUNICATION SITES--Continued

Where BLM adjusts the annual rental for a telecommunications site right-of-way based on the comparable lease method of valuation and, following an informal hearing on the appraisal, abandons the appraisal in favor of a market data study of telecommunication site annual rental values, the decision establishing the rental on the basis of the market data study will be vacated and remanded for reappraisal, where the market study did not fully identify the lease transactions relied upon and BLM provided no analysis of how the right-of-way being appraised compared to any particular information in the market study.

Mountain States Telephone & Telegraph Co., 107 IBLA 82 (Jan. 31, 1989)

Where BLM has set the annual rental charges for a communications site right-of-way based on an appraisal of the fair market rental value of that site which failed, without adequate justification, to consider a comparable lease of arguable significance, the Board will set aside the decision setting the rental charges and remand for a reappraisal and any necessary recalculation of such charges.

Richard Boulais, dba Private Line Communications, 107 IBLA 109 (Feb. 2, 1989)

An appraisal of fair market rental value for a communication site right-of-way will not be set aside on appeal if an appellant fails to show error in the appraisal methods used or fails to show by convincing evidence that the charges are excessive. In the absence of a preponderance of evidence that a BLM appraisal is erroneous, such an appraisal may be rebutted only by another appraisal.

Where there are multiple users of the same communication site, each user is individually responsible for the fair market rental value of the authorized use of the site.

Chalfont Communications, 108 IBLA 195 (Apr. 13, 1989)

COMMUNICATION SITES--Continued

An appraisal of the fair market rental value of a right-of-way for a communications site may be set aside and remanded where the appraisal report provides insufficient data on leases compared and insufficient analysis of the differences and similarities between the comparable leases and the subject lease to support the appraisal.

Mountain States Telephone & Telegraph Co., 109 IBLA 142 (June 8, 1989)

An appraisal of fair market rental value for a communication site right-of-way will not be set aside on appeal if an appellant fails to show error in the appraisal methods used or fails to show by convincing evidence that the charges are excessive. In the absence of a preponderance of evidence that a BLM appraisal is erroneous, such an appraisal may be rebutted only by another appraisal.

Big Sky Communications, Inc., 110 IBLA 213 (Aug. 21, 1989)

CONFIDENTIAL INFORMATION

"Proprietary information." Proprietary information means information, which, if disclosed, would do substantial harm to the competitive position of the outside source from which it was obtained and would inhibit the Government's ability to obtain this type of information in the future, resulting in a substantial detrimental effect on a Government program. Internally generated Governmental conclusions and information are not generally proprietary.

B. A. Wilford, 110 IBLA 154 (Aug. 11, 1989)

CONTESTS AND PROTESTS

GENERALLY

An Alaska Native allotment applicant is required to make satisfactory proof of substantially continuous use and occupancy of the land for a minimum period of 5 years. Such use and occupancy contemplates substantial actual possession or use of the land, at least potentially exclusive of others. In a private contest initiated by a Native corporation following a BLM decision holding the Native allotment for approval, the Native corporation carries the burden of showing by a preponderance of the evidence that the Native allotment application is not valid.

Kootznoowoo, Inc. v. Heirs of Jimmie Johnson, 109 IBLA 128 (June 8, 1989)

When a rival mining claimant files an adverse claim against a mineral patent application, the adverse claimant is required to commence proceedings in a court of competent jurisdiction within 30 days after filing his claim, and failure so to do shall be a waiver of his adverse claims.

The failure to file a timely appeal from a decision by an Administrative Law Judge in a private contest declaring mining claims invalid precludes the Board from considering the contestee's appeal from the denial of a later protest to the extent that the appeal involves issues resolved in the contest decision.

Where an application for mineral patent of lode claims is filed and no adverse claim is asserted as required by 30 U.S.C. § 30 (1982), the character of the deposit as lode is conclusively established as to any adverse claimant, and a subsequent challenge by such claimant asserting the claimed deposits are placer is properly rejected.

Melvin Helit, A-Able Plumbing, Inc., 110 IBLA 144 (Aug. 10, 1989)

CONTESTS AND PROTESTS--Continued

GENERALLY--Continued

Jurisdiction over disputes between rival mining claimants is reserved to the courts, and it is not for this Department to decide whether one claimant has a better right to a claim than a rival claimant. Approval of a mining plan of operations is based upon a determination that such operations will not result in unnecessary or undue degradation of Federal lands, and not on a determination that the party submitting the plan of operations will be able to conduct the proposed operations without trespassing on lands held by others. Therefore, one seeking to prevent operations outlined in a plan of operations submitted to BLM because such operations allegedly would result in trespass should seek such relief in a court of competent jurisdiction.

Jurisdiction over disputes between rival mining claimants is reserved to the courts, and it is not for the Department to decide whether one claimant has a better right to a claim because the rival claimant has allegedly failed to file the document required under sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1976).

Rufus B. McIlroy, 111 IBLA 144 (Sept. 29, 1989)

CONTRACTS

GENERALLY

A bidder is entitled to reasonably rely on indications in the specifications and the Government's pre-award actions in ascertaining the nature and timing of the work to be performed under a contract; and where numerous Government delays prevent timely performance and the work is carried over into the winter and spring months, causing substantial additional costs, the Government is liable for the additional costs.

Appeal of Middlesex Contractors & Riggers, Inc., IBCA-1964 (Feb. 8, 1989) 96 I.D. 31

CONTRACTS--Continued

CONSTRUCTION AND OPERATION

Actions of Parties

A bidder is entitled to reasonably rely on indications in the specifications and the Government's pre-award actions in ascertaining the nature and timing of the work to be performed under a contract; and where numerous Government delays prevent timely performance and the work is carried over into the winter and spring months, causing substantial additional costs, the Government is liable for the additional costs.

Appeal of Middlesex Contractors & Riggers, Inc., IBCA-1964 (Feb. 8, 1989) 96 I.D. 31

Where a contractor's conduct during performance of a tree-clearing contract strongly indicates that he understood that trimming was a significant part of the work, such conduct is considered persuasive evidence of what the contract required, in considering the contractor's claim for alleged extra costs incurred by such trimming.

Where a contractor demonstrated the established practice in the tree-clearing industry regarding the cutting of trees which were located on the outer border of the contract cutting zone, and the Government inspector's procedure indicates that he improperly directed the contractor to cut trees clearly beyond the area considered by industry practice to be within the cutting zone, the Board found such direction to constitute extra work for which the contractor was entitled to an equitable adjustment.

Appeal of Hal Allred, IBCA-2447-A (Feb. 16, 1989) 96 I.D. 62

Where the evidence demonstrated the occurrence of a 2-year delay between the time a contract was terminated by the contracting officer and his final decision that the termination be for default, such action was upheld by the Board due to the contractor's failure to show that it was materially prejudiced by the delay,

CONTRACTS--Continued

CONSTRUCTION AND OPERATION--Continued

Actions of Parties--Continued

or that such delay was exclusively the fault of the Government.

Appeal of Scalf Engineering Co. & Pike County Construction Co. (A Joint Venture), IBCA-2328 (June 9, 1989) 96 I.D. 257

Allowable Costs

A contracting officer is not entitled to reduce the amount paid to a construction contractor under a competitive fixed-price contract by reason of state or local taxes the contractor was not required to pay. FAR provisions 48 CFR 52.229-3 by its terms requires adjustments only for post-contract changes in Federal taxes.

Appeal of Northwest Piping, Inc., IBCA-2611-A (May 3, 1989)

A contractor's claim for additional termination costs was not allowable where the evidence showed that but for the contractor's failure to comply with the specifications and its performance inefficiencies, such expenses would not have been incurred.

Appeal of Scalf Engineering Co. & Pike County Construction Co. (A Joint Venture), IBCA-2328 (June 9, 1989) 96 I.D. 257

Changed Conditions (Differing Site Conditions)

A bidder is entitled to reasonably rely on indications in the specifications and the Government's pre-award actions in ascertaining the nature and timing of the work to be performed under a contract; and where numerous Government delays prevent timely performance and the work is carried over into the winter and spring

CONTRACTS--Continued

CONSTRUCTION AND OPERATION--Continued

Changed Conditions (Differing Site Conditions) --Continued

months, causing substantial additional costs, the Government is liable for the additional costs.

Appeal of Middlesex Contractors & Riggers, Inc., IBCA-1964 (Feb. 8, 1989) 96 I.D. 31

Changes and Extras

A contractor was found to be entitled to an equitable adjustment for excess costs allegedly incurred during performance of site restoration work, where it failed to show that the Government's technical project officer (TPO), who oversaw performance of the work, arbitrarily or capriciously withheld her approval of such work, or that any directive issued by the TPO exceeded industry standards or was beyond the scope of the contract requirements.

Appeal of Geo-Con, Inc., IBCA-2195, 2196 (Mar. 14, 1989)

Where a land-clearing contract required all hauled material to be relatively free of dirt or soil so it could be readily burned; and the Government's witnesses, including a fire-management expert, agreed unanimously that the debris piled by the contractor contained as much as 45 percent dirt and did not readily burn, the contractor is not entitled to additional compensation for its unforeseen, but largely unsuccessful, extra work in attempting to meet the contract's specification on the mere allegation that the word "relatively" made the specification ambiguous.

Extra work by a land-clearing contractor that would not have been compensable if the contract had been successfully completed does not become compensable merely because the contract was later terminated for the Government's convenience.

Appeal of Lemire Contracting, IBCA-2549, 2550 (Apr. 17, 1989) 96 I.D. 189

CONTRACTS--Continued

CONSTRUCTION AND OPERATION--Continued

Changes and Extras--Continued

The Board finds that where the award of a base bid is interpreted by the contractor to be restricted to one unit of a building, and that broader language in the specifications applying to all units creates inconsistencies, the interpretation of the contractor is reasonable and preferred to that of the Government which leaves unexplained inconsistencies; and that the intent of the parties to confine the base bid work to the one unit is evident from the drawings and the prevailing circumstances which necessitated ordering a portion of the unawarded alternative bid to protect the work from extreme weather conditions.

Appeal of Titan Construction, Inc., IBCA-2366 (Apr. 25, 1989)

Conflicting Clauses

A contractor's claim for an equitable adjustment for extra trimming work allegedly incurred during the performance of a tree-clearing contract was denied, where the contractor's reading of the solicitation, combined with his actual knowledge of conditions that existed at the site created an ambiguity so patent, that a reasonable bidder would not have bid the contract without first seeking clarification from the contracting officer as to the actual contract requirements. It is well-settled that a contractor, faced with an obvious inconsistency or discrepancy of significance, is obliged to seek clarification from the Government prior to bidding.

Appeal of Hal Allred, IBCA-2447-A (Feb. 16, 1989) 96 I.D. 62

Contract Clauses

Where a land-clearing contract required all hauled material to be relatively free of dirt or soil so it could be readily burned; and the Government's witnesses, including a fire-management expert, agreed unanimously that the debris piled by the contractor contained as much as 45 percent dirt and did not readily burn, the contractor is not entitled to additional compensation for its unforeseen, but largely unsuccessful, extra

CONTRACTS--Continued

CONSTRUCTION AND OPERATION--Continued

Contract Clauses--Continued

work in attempting to meet the contract's specification on the mere allegation that the word "relatively" made the specification ambiguous.

Extra work by a land-clearing contractor that would not have been compensable if the contract had been successfully completed does not become compensable merely because the contract was later terminated for the Government's convenience.

Appeal of Lemire Contracting, IBCA-2549, 2550 (Apr. 17, 1989) 96 I.D. 189

A contractor's claim on reconsideration, for an equitable adjustment for extra trimming work incurred during performance of a tree-clearing contract along the North Rim of the Grand Canyon National Park, was denied, where the Board concluded that the contractor's application of an industry practice which would allow it to leave untrimmed, hundreds of limbs extending into the contract cutting zone, was inconsistent with the objective of the contract, which was to trim such limbs to a 12-foot canopy so as to provide greater visibility and safety for motorists traveling along the 22.3 miles of roadway leading into the Park.

Appeal of Hal Allred (On Appellant's Motion for Reconsideration), IBCA-2447-A (May 8, 1989)

Contracting Officer

Where the evidence demonstrated the occurrence of a 2-year delay between the time a contract was terminated by the contracting officer and his final decision that the termination be for default, such action was upheld by the Board due to the contractor's failure to show that it was materially prejudiced by the delay, or that such delay was exclusively the fault of the Government.

Appeal of Scalf Engineering Co. & Pike County Construction Co. (A Joint Venture), IBCA-2328 (June 9, 1989) 96 I.D. 257

CONTRACTS--Continued

CONSTRUCTION AND OPERATION--Continued

Differing Site Conditions (Changed Conditions)

Where a contractor makes a written request for an increase in price based on a claim of a differing site condition, and 2 days after receipt by the contracting officer, re-delivers all Government-furnished fencing materials and insists on abandoning performance of the contract on the following day, the Board finds no evidence supporting the differing site condition and finds the termination for default to be proper.

Appeal of Harland Jones & R. Jackie Bowen (Contractors), IBCA-2444 (May 2, 1989)

Drawings and Specifications

A bidder is entitled to reasonably rely on indications in the specifications and the Government's pre-award actions in ascertaining the nature and timing of the work to be performed under a contract; and where numerous Government delays prevent timely performance and the work is carried over into the winter and spring months, causing substantial additional costs, the Government is liable for the additional costs.

Appeal of Middlesex Contractors & Riggers, Inc., IBCA-1964 (Feb. 8, 1989) 96 I.D. 31

Duty to Inquire

A contractor's claim for an equitable adjustment for extra trimming work allegedly incurred during the performance of a tree-clearing contract was denied, where the contractor's reading of the solicitation, combined with his actual knowledge of conditions that existed at the site created an ambiguity so patent, that a reasonable bidder would not have bid the contract without first seeking clarification from the contracting officer as to the actual contract requirements. It is well-settled that a contractor, faced with an obvious inconsistency or discrepancy of significance, is obliged to seek clarification from the Government prior to bidding.

Appeal of Hal Allred, IBCA-2447-A (Feb. 16, 1989) 96 I.D. 62

CONTRACTS--Continued

CONSTRUCTION AND OPERATION--Continued

General Rules of Construction

A contractor's claim for an equitable adjustment for extra trimming work allegedly incurred during the performance of a tree-clearing contract was denied, where the contractor's reading of the solicitation, combined with his actual knowledge of conditions that existed at the site created an ambiguity so patent, that a reasonable bidder would not have bid the contract without first seeking clarification from the contracting officer as to the actual contract requirements. It is well-settled that a contractor, faced with an obvious inconsistency or discrepancy of significance, is obliged to seek clarification from the Government prior to bidding.

Appeal of Hal Allred, IBCA-2447-A (Feb. 16, 1989) 96 I.D. 62

A contractor's claim on reconsideration, for an equitable adjustment for extra trimming work incurred during performance of a tree-clearing contract along the North Rim of the Grand Canyon National Park, was denied, where the Board concluded that the contractor's application of an industry practice which would allow it to leave untrimmed, hundreds of limbs extending into the contract cutting zone, was inconsistent with the objective of the contract, which was to trim such limbs to a 12-foot canopy so as to provide greater visibility and safety for motorists traveling along the 22.3 miles of roadway leading into the Park.

Appeal of Hal Allred (On Appellant's Motion for Reconsideration), IBCA-2447-A (May 8, 1989)

Intent of Parties

Where a land-clearing contract required all hauled material to be relatively free of dirt or soil so it could be readily burned; and the Government's witnesses, including a fire-management expert, agreed unanimously that the debris piled by the contractor contained as much as 45 percent dirt and did not readily burn, the contractor is not entitled to additional compensation for its unforeseen, but largely unsuccessful, extra

CONTRACTS--Continued

CONSTRUCTION AND OPERATION--Continued

Intent of Parties--Continued

work in attempting to meet the contract's specification on the mere allegation that the word "relatively" made the specification ambiguous.

Extra work by a land-clearing contractor that would not have been compensable if the contract had been successfully completed does not become compensable merely because the contract was later terminated for the Government's convenience.

Appeal of Lemire Contracting, IBCA-2549, 2550 (Apr. 17, 1989) 96 I.D. 189

The Board finds that where the award of a base bid is interpreted by the contractor to be restricted to one unit of a building, and that broader language in the specifications applying to all units creates inconsistencies, the interpretation of the contractor is reasonable and preferred to that of the Government which leaves unexplained inconsistencies; and that the intent of the parties to confine the base bid work to the one unit is evident from the drawings and the prevailing circumstances which necessitated ordering a portion of the unawarded alternative bid to protect the work from extreme weather conditions.

Appeal of Titan Construction, Inc., IBCA-2366 (Apr. 25, 1989)

Modification of Contracts

Generally

Unspecific, standard release language in a contract modification is sufficient to dispose only of those matters to which it clearly relates and/or which were within the contemplation of the parties. A boilerplate claims release clause contained in a no-fault time-extension modification is not sufficient to release additional contractor cost claims that the parties have never considered.

Appeal of Middlesex Contractors & Riggers, Inc., IBCA-1964 (Feb. 8, 1989) 96 I.D. 31

CONTRACTS--Continued

CONSTRUCTION AND OPERATION--Continued

Modification of Contracts--Continued

Generally--Continued

Where the Government sought to modify the cutting requirements of a tree-clearing contract at a pre-bid inspection to include a 7 - 10-foot cutting variation, such modification, though relied upon by the contractor in computing his bid, was found to not alter the basic requirements of the contract. These requirements were misread by the contractor and resulted in his underestimating the scope of the work, but he failed to show damage or how such modification constituted extra work for which he was entitled to an equitable adjustment.

Appeal of Hal Allred, IBCA-2447-A (Feb. 16, 1989)
96 I.D. 62

The Board finds that a contractor's unqualified acceptance of the Government's offer of payment for an ordered change to constitute an accord and satisfaction, barring further claims for payment for the same change, and dismisses the appeal.

Hawkins & Powers Aviation, Inc., IBCA-2387 (Apr. 25, 1989)

A contract modification resulting in a deductive change to a firm, fixed-price contract is priced on the basis of its effect on the contractor, not on the basis of its apparent value to the Government. Thus, where two Government-leased helicopters, each having its own mechanic, are subsequently based at the same location, the Government may not simply unilaterally eliminate one mechanic by contract modification and commensurate deduction, and require the other mechanic to maintain both helicopters, regardless of the fact that the contractor may still have to pay the eliminated mechanic.

Appeal of Temsco Helicopters, Inc., IBCA-2594-A, 2595-A (May 3, 1989)

CONTRACTS--Continued

CONTRACT DISPUTES ACT OF 1978

Generally

The Board denies a claim for breach of contract damages by an investigator supplier under a BPA where it finds: (i) that the placement of calls (orders) for background investigations of individuals for sensitive positions in the Government is discretionary with OPM; (ii) that under the terms of the BPA, OPM is only liable for calls actually placed with an investigator supplier; (iii) that it is undisputed that the appellant has been paid for all of the calls, actually placed with him; and (iv) that assuming, arguendo, that the terms of the BPA were breached in some way, appellant has failed to show any damages caused by the breach.

Appeal of Norris E. Dixon, IBCA-2581 (Sept. 25, 1989)
96 I.D. 434

Attorney Fees

In a case where the appellant is a prevailing party on a claim constituting 39.24 percent of the total dollar value of the claims submitted, the applicant is awarded 75 percent of the attorney hours and other expenses claimed where the Board finds that the position of the Government in refusing to pay the appellant's claim in the amount initially submitted had little support in the law or in the facts.

Salisbury & Dietz, Inc. (Application for Attorney Fees), IBCA-2382-F (June 23, 1989) 96 I.D. 280

Interest

The Board finds there is no statutory entitlement to interest on amounts claimed due under proposals for adjustment of the contract price under the Prompt Payment Act because under the circumstances, despite long delays before the proposals were incorporated into the ontract, there were no proper invoices or required payment dates as specified in the Prompt Payment Act,

CONTRACTS--Continued

CONTRACT DISPUTES ACT OF 1978--Continued

Interest--Continued

and the proposals never became claims within the meaning of the Contract Disputes Act.

Appeal of Columbia Engineering Corp., IBCA-2322 (Apr. 21, 1989)

Under the Prompt Payment Act no interest is payable on an agreed upon equitable adjustment for a change until a modification reflecting the agreement between the parties has increased the contract price, since prior to that time there was neither a proper invoice nor a required payment date as specified in the Prompt Payment Act.

A claim for interest under the Contract Disputes Act from the date a certified request for an equitable adjustment is received is denied, where the Board finds (i) that the letter containing the certification was an invitation to the Government to negotiate on the amount of equitable adjustment to be provided; (ii) that the letter did not constitute "a written demand" by the contractor, "seeking, as a matter of right, the payment of money in a sum certain"; and (iii) that the letter did not constitute the submission of a claim to the contracting officer for a decision on which interest would be payable from the date of receipt to the payment thereof.

Appeal of D. H. Blattner & Sons, Inc., IBCA-2589, 2463 (Sept. 18, 1989) 96 I.D. 400

Jurisdiction

A concession contract entered into by NPS is a procurement contract subject to the Contract Disputes Act, since it is for services that the Government itself would otherwise provide, and no statutory exemption from the Act or exclusionary intent by Congress is evident.

Appeal of R & R Enterprises, IBCA-2417 (Mar. 24, 1989) 96 I.D. 148

CONTRACTS--Continued

DISPUTES AND REMEDIES

Generally

The Board finds there is no statutory entitlement to interest on amounts claimed due under proposals for adjustment of the contract price under the Prompt Payment Act because under the circumstances, despite long delays before the proposals were incorporated into the contract, there were no proper invoices or required payment dates as specified in the Prompt Payment Act, and the proposals never became claims within the meaning of the Contract Disputes Act.

Appeal of Columbia Engineering Corp., IBCA-2322 (Apr. 21, 1989)

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Appeal of D. H. Blattner & Sons, Inc., IBCA-2589, 2463 (Sept. 18, 1989) 96 I.D. 400

CONTRACTS--Continued

DISPUTES AND REMEDIES--Continued

Burden of Proof

Where the Government sought to modify the cutting requirements of a tree-clearing contract at a pre-bid inspection to include a 7 - 10-foot cutting variation, such modification, though relied upon by the contractor in computing his bid, was found to not alter the basic requirements of the contract. These requirements were misread by the contractor and resulted in his underestimating the scope of the work, but he failed to show damage or how such modification constituted extra work for which he was entitled to an equitable adjustment.

Appeal of Hal Allred, IBCA-2447-A (Feb. 16, 1989) 96 I.D. 62

A contractor was found to be entitled to an equitable adjustment for excess costs allegedly incurred during performance of site restoration work, where it failed to show that the Government's technical project officer (TPO), who oversaw performance of the work, arbitrarily or capriciously withheld her approval of such work, or that any directive issued by the TPO exceeded industry standards or was beyond the scope of the contract requirements.

Appeal of Geo-Con, Inc., IBCA-2195, 2196 (Mar. 14, 1989)

Where the Government was able to demonstrate that a reclamation contractor failed to comply with the terms of its contract to stabilize a landslide on an abandoned minesite, or complete the work within the time specified, it was found to have met its burden of proving the facts of the contractor's default.

Where a contractor failed to demonstrate that its nonperformance of a contract was otherwise excusable, the Board found the termination of such contract for default to be proper.

Appeal of Scalf Engineering Co. & Pike County Construction Co. (A Joint Venture), IBCA-2328 (June 9, 1989) 96 I.D. 257

CONTRACTS--Continued

DISPUTES AND REMEDIES--Continued

Burden of Proof--Continued

After thorough reconsideration and reanalysis of its original decision, pursuant to BECO's four specifications of error, the Board finds that it did not err as alleged; confirms its original decision; and concludes that the principal reasons for appellant's failure to achieve higher recovery for its claims on appeal were: (1) failure to articulate and define the terms of the prehearing quantum stipulation and (2) failure to adduce specific and probative evidence of delays caused by the actions or omissions of the Government.

Appeal of BECO, Inc. (On Reconsideration), IBCA-1693 (July 18, 1989)

The Board denies all 10 remaining equitable adjustment claims of the contractor, on behalf of its mechanical subcontractor, after settlement, withdrawal, or dismissal of some 20 other claims, all arising out of the construction of a Marine Environmental Assessment Facility at the Environmental Protection Agency's Environmental Research Laboratory, Sabine Island, Gulf Breeze, Florida. The denials are based on the contractor's failure to sustain its burden of proof with respect to entitlement, quantum, or both, by application of fundamental legal tenets, including the following: that to prove a claim, a contractor has the burden of not only establishing entitlement by a preponderance of substantial evidence, but also of supporting the quantum aspect of the claim by substantial, probative, and reliable evidence; that mere allegations or restatements of the amount claimed do not constitute proof and do not sustain that burden; that, to prevail, a contractor must show a consideration between the alleged extra contract work and the costs claimed.

Appeals of Whitesell-Green, Inc., IBCA-1928 et al. (Aug. 21, 1989)

CONTRACTS--Continued

DISPUTES AND REMEDIES--Continued

Burden of Proof--Continued

The Board denies a claim for breach of contract damages by an investigator supplier under a BPA where it finds: (i) that the placement of calls (orders) for background investigations of individuals for sensitive positions in the Government is discretionary with OPM; (ii) that under the terms of the BPA, OPM is only liable for calls actually placed with an investigator supplier; (iii) that it is undisputed that the appellant has been paid for all of the calls, actually placed with him; and (iv) that assuming, arguendo, that the terms of the BPA were breached in some way, appellant has failed to show any damages caused by the breach.

Appeal of Norris E. Dixon, IBCA-2581 (Sept. 25, 1989)
96 I.D. 434

Damages

Generally

Where the Government sought to modify the cutting requirements of a tree-clearing contract at a pre-bid inspection to include a 7 - 10-foot cutting variation, such modification, though relied upon by the contractor in computing his bid, was found to not alter the basic requirements of the contract. These requirements were misread by the contractor and resulted in his underestimating the scope of the work, but he failed to show damage or how such modification constituted extra work for which he was entitled to an equitable adjustment.

Appeal of Hal Allred, IBCA-2447-A (Feb. 16, 1989)
96 I.D. 62

Where a Regional Chief of Concessions of NPS, with 25 years of hospitality experience, recognized the marginal financial ability and inexperience of a proposed concessioner; was aware because of two prior concessioner failures of the hazards of a proposed winter operation (which included the freezing of pipes and an inadequate sewer system that could be condemned by the State); and knew that NPS was proposing to replace the water and sewer system in the near future which was likely to disrupt the concessioner's

CONTRACTS--Continued

DISPUTES AND REMEDIES--Continued

Damages--Continued

Generally--Continued

operations for from 6 months to a year or more; but nevertheless approved the concessioner's contract without adequately disclosing or discussing these problems with the proposed concessioner prior to approval, the NPS is liable for the disruption to the concessioner caused by the subsequent water and sewer construction project on the basis of its initial superior knowledge and its subsequent interference with the concessioner's efforts to carry out its service contract.

Appeal of R & R Enterprises, IBCA-2417 (Mar. 24, 1989)
96 I.D. 148

The Board denies a claim for breach of contract damages by an investigator supplier under a BPA where it finds: (i) that the placement of calls (orders) for background investigations of individuals for sensitive positions in the Government is discretionary with OPM; (ii) that under the terms of the BPA, OPM is only liable for calls actually placed with an investigator supplier; (iii) that it is undisputed that the appellant has been paid for all of the calls, actually placed with him; and (iv) that assuming, arguendo, that the terms of the BPA were breached in some way, appellant has failed to show any damages caused by the breach.

Appeal of Norris E. Dixon, IBCA-2581 (Sept. 25, 1989)
96 I.D. 434

Actual Damages

An NPS concessioner is not entitled to the award of lost profits where the alleged amount thereof is based on an inadequate period of operation and therefore is excessively speculative.

An NPS concessioner is not entitled to the award of consequential damages that may indirectly result from the forced sale of a residential property unrelated to the contract, even though the proceeds of such sale were subsequently used to prevent foreclosure on

CONTRACTS--Continued

DISPUTES AND REMEDIES--Continued

Damages--Continued

Actual Damages--Continued

the concession property, because the loss on the sale of the unrelated property was too remote and indirect to have been reasonably anticipated by NPS at the time the concession contract was entered into.

Appeal of R & R Enterprises, IBCA-2417 (Mar. 24, 1989) 96 I.D. 148

Liquidated Damages

An assessment of liquidated damages for delays in work completion is not sustained where the assessment is contested, where a justifiable extension of completion time is denied by the contracting officer for insufficiently specific reasons, where a preponderance of evidence shows that the work was substantially completed within the time extension anticipated, and where the Government has shown no injury as a result of the completion delay.

Appeal of Middlesex Contractors & Riggers, Inc., IBCA-1964 (Feb. 8, 1989) 96 I.D. 31

Measurement

Where an NPS concessioner was clearly damaged in its ability to operate its resort by the fact that NPS undertook the construction of a water and sewer project during its tenure, but the bases for ascertaining damages put forth by the concessioner were too remote and speculative for the Board to adopt, a determination of damages by jury verdict is appropriate.

Appeal of R & R Enterprises, IBCA-2417 (Mar. 24, 1989) 96 I.D. 148

CONTRACTS--Continued

DISPUTES AND REMEDIES--Continued

Damages--Continued

Measurement--Continued

In the absence of proof that the Government actually paid excess reprocurement costs to complete a contract terminated for default, its claim against the defaulted contractor for such costs was denied.

Appeal of Scalf Engineering Co. & Pike County Construction Co. (A Joint Venture), IBCA-2328 (June 9, 1989) 96 I.D. 257

Equitable Adjustments

Where a contractor demonstrated the established practice in the tree-clearing industry regarding the cutting of trees which were located on the outer border of the contract cutting zone, and the Government inspector's procedure indicates that he improperly directed the contractor to cut trees clearly beyond the area considered by industry practice to be within the cutting zone, the Board found such direction to constitute extra work for which the contractor was entitled to an equitable adjustment.

Appeal of Hal Allred, IBCA-2447-A (Feb. 16, 1989) 96 I.D. 62

A contractor was found to be entitled to an equitable adjustment for excess costs allegedly incurred during performance of site restoration work, where it failed to show that the Government's technical project officer (TPO), who oversaw performance of the work, arbitrarily or capriciously withheld her approval of such work, or that any directive issued by the TPO exceeded industry standards or was beyond the scope of the contract requirements.

Appeal of Geo-Con, Inc., IBCA-2195, 2196 (Mar. 14, 1989)

CONTRACTS--Continued

DISPUTES AND REMEDIES--Continued

Equitable Adjustments--Continued

A contract modification resulting in a deductive change to a firm, fixed-price contract is priced on the basis of its effect on the contractor, not on the basis of its apparent value to the Government. Thus, where two Government-leased helicopters, each having its own mechanic, are subsequently based at the same location, the Government may not simply unilaterally eliminate one mechanic by contract modification and commensurate deduction, and require the other mechanic to maintain both helicopters, regardless of the fact that the contractor may still have to pay the eliminated mechanic.

Appeal of Temsco Helicopters, Inc., IBCA-2594-A, 2595-A (May 3, 1989)

A contractor's claim for additional termination costs was not allowable where the evidence showed that but for the contractor's failure to comply with the specifications and its performance inefficiencies, such expenses would not have been incurred.

Appeal of Scalf Engineering Co. & Pike County Construction Co. (A Joint Venture), IBCA-2328 (June 9, 1989) 96 I.D. 257

Termination for Convenience

Extra work by a land-clearing contractor that would not have been compensable if the contract had been successfully completed does not become compensable merely because the contract was later terminated for the Government's convenience.

Appeal of Lemire Contracting, IBCA-2549, 2550 (Apr. 17, 1989) 96 I.D. 189

CONTRACTS--Continued

DISPUTES AND REMEDIES--Continued

Termination for Default

Generally

Where a contractor makes a written request for an increase in price based on a claim of a differing site condition, and 2 days after receipt by the contracting officer, re-delivers all Government-furnished fencing materials and insists on abandoning performance of the contract on the following day, the Board finds no evidence supporting the differing site condition and finds the termination for default to be proper.

Appeal of Harland Jones & R. Jackie Bowen (Contractors), IBCA-2444 (May 2, 1989)

Where a contractor completed less than 5 percent of a contract for construction of 13.5 miles of barbed wire fence before abandoning performance and later complained that he should have been allowed more time to obtain a bank loan, the contractor has stated no grounds for excusing his abandonment of the contract and the Board finds that the contract was properly terminated for default.

Appeal of Karl R. Kemp, IBCA-2488 (May 3, 1989)

Where the Government was able to demonstrate that a reclamation contractor failed to comply with the terms of its contract to stabilize a landslide on an abandoned minesite, or complete the work within the time specified, it was found to have met its burden of proving the facts of the contractor's default.

Where the evidence demonstrated the occurrence of a 2-year delay between the time a contract was terminated by the contracting officer and his final decision that the termination be for default, such action was upheld by the Board due to the contractor's failure to show that it was materially prejudiced by the delay, or that such delay was exclusively the fault of the Government.

Where a contractor failed to demonstrate that its nonperformance of a contract was otherwise excusable,

CONTRACTS--Continued

DISPUTES AND REMEDIES--Continued

Termination for Default--Continued

Generally--Continued

the Board found the termination of such contract for default to be proper.

Appeal of Scalf Engineering Co. & Pike County Construction Co. (A Joint Venture), IBCA-2328 (June 9, 1989) 96 I.D. 257

For a termination for default to be sustained on appeal, the Government's cure notice to the contractor must be clear, specific, and unambiguous; and the performance date imposed either must be set by mutual agreement of the parties, or if unilaterally established by the Government, must be reasonable. The burden of proof as to reasonableness is upon the Government.

Where the Government unilaterally issues to an aircraft contractor an ambiguous and garbled cure notice on the Friday before a Memorial Day weekend, with performance required by the Tuesday immediately after the Monday Memorial Day holiday, in circumstances in which the contractor has not concurred in the assigned completion date, the resulting default termination for failure to cure defects in accordance with the notice is unreasonable and will not be sustained.

Appeal of Central Air Service, Inc., IBCA-1827 (Aug. 28, 1989)

Excess Costs

In the absence of proof that the Government actually paid excess reprocurement costs to complete a contract terminated for default, its claim against the defaulted contractor for such costs was denied.

Appeal of Scalf Engineering Co. & Pike County Construction Co. (A Joint Venture), IBCA-2328 (June 9, 1989) 96 I.D. 257

CONTRACTS--Continued

FEDERAL PROCUREMENT REGULATIONS

A contracting officer is not entitled to reduce the amount paid to a construction contractor under a competitive fixed-price contract by reason of state or local taxes the contractor was not required to pay. FAR provisions 48 CFR 52.229-3 by its terms requires adjustments only for post-contract changes in Federal taxes.

Appeal of Northwest Piping, Inc., IBCA-2611-A (May 3, 1989)

FORMATION AND VALIDITY

Bid Award

The Board has no authority to grant relief to a contractor whose subcontractor discovers a bid error after the contract has been awarded unless the circumstances surrounding the error satisfy the requirements of FAR provision 14.406-4(c).

A contracting officer is entitled to rely on a contractor's low bid where there is no apparent error in the bid submission and the bid is separated by only 7 and 11 percent, respectively, from the two next lowest bids out of eight bids submitted. Confirmation of bids is required only when (1) there is a substantial discrepancy between the sole responsive bid submitted and the Government's estimate, or (2) there appears to be some irregularity in the low bid or in the pattern of responsive bids.

Appeal of Edsall Construction Co., Inc., IBCA-2450 (Aug. 28, 1989)

The appeal procedures in 25 CFR Part 2 do not apply to the protest of an award of a Federal procurement contract by a Bureau of Indian Affairs contracting officer, because procedures for such protests are set out in the Federal Acquisition Regulations, 48 CFR Parts 33.1 and 1433.1. The Board

CONTRACTS--Continued

FORMATION AND VALIDITY--Continued

Bid Award--Continued

of Indian Appeals lacks jurisdiction over such protests.

United Sioux Tribes Development Corp. v. Aberdeen Area Director, Bureau of Indian Affairs, 17 IBIA 286 (Sept. 14, 1989)

Fixed-price Contracts

A contracting officer is not entitled to reduce the amount paid to a construction contractor under a competitive fixed-price contract by reason of state or local taxes the contractor was not required to pay. FAR provisions 48 CFR 52.229-3 by its terms requires adjustments only for post-contract changes in Federal taxes.

Appeal of Northwest Piping, Inc., IBCA-2611-A (May 3, 1989)

PERFORMANCE OR DEFAULT

Compensable Delays

A bidder is entitled to reasonably rely on indications in the specifications and the Government's pre-award actions in ascertaining the nature and timing of the work to be performed under a contract; and where numerous Government delays prevent timely performance and the work is carried over into the winter and spring months, causing substantial additional costs, the Government is liable for the additional costs.

Appeal of Middlesex Contractors & Riggers, Inc., IBCA-1964 (Feb. 8, 1989) 96 I.D. 31

CONTRACTS--Continued

PERFORMANCE OR DEFAULT--Continued

Excusable Delays

Where a contractor completed less than 5 percent of a contract for construction of 13.5 miles of barbed wire fence before abandoning performance and later complained that he should have been allowed more time to obtain a bank loan, the contractor has stated no grounds for excusing his abandonment of the contract and the Board finds that the contract was properly terminated for default.

Appeal of Karl R. Kemp, IBCA-2488 (May 3, 1989)

Impossibility of Performance

Where a Regional Chief of Concessions of NPS, with 25 years of hospitality experience, recognized the marginal financial ability and inexperience of a proposed concessioner; was aware because of two prior concessioner failures of the hazards of a proposed winter operation (which included the freezing of pipes and an inadequate sewer system that could be condemned by the State); and knew that NPS was proposing to replace the water and sewer system in the near future, which was likely to disrupt the concessioner's operations for from 6 months to a year or more; but nevertheless approved the concessioner's contract without adequately disclosing or discussing these problems with the proposed concessioner prior to approval, the NPS is liable for the disruption to the concessioner caused by the subsequent water and sewer construction project on the basis of its initial superior knowledge and its subsequent interference with the concessioner's efforts to carry out its service contract.

Appeal of R & R Enterprises, IBCA-2417 (Mar. 24, 1989) 96 I.D. 148

Inspection

Where a contractor demonstrated the established practice in the tree-clearing industry regarding the cutting of trees which were located on the outer border of the contract cutting zone, and the Government inspector's procedure indicates that he improperly directed the contractor to cut trees clearly beyond

CONTRACTS--Continued

PERFORMANCE OR DEFAULT--Continued

Inspection--Continued

the area considered by industry practice to be within the cutting zone, the Board found such direction to constitute extra work for which the contractor was entitled to an equitable adjustment.

Appeal of Hal Allred, IBCA-2447-A (Feb. 16, 1989) 96 I.D. 62

Release and Settlement

Unspecific, standard release language in a contract modification is sufficient to dispose only of those matters to which it clearly relates and/or which were within the contemplation of the parties. A boilerplate claims release clause contained in a no-fault time-extension modification is not sufficient to release additional contractor cost claims that the parties have never considered.

Appeal of Middlesex Contractors & Riggers, Inc., IBCA-1964 (Feb. 8, 1989) 96 I.D. 31

CONVEYANCES

GENERALLY

If a proper party lodged a timely protest of a Native allotment application filed pursuant to the Act of May 17, 1906, 34 Stat. 197, that application is removed from the automatic vesting provisions of ANILCA, and is adjudicated pursuant to the Act of May 17, 1906. If, after adjudication, BLM issues a decision holding the Native allotment application for approval, the adjudicatory process had been carried to the point of a BLM decision on the merits of the application. Having preserved his rights under sec. 905(a)(1) of ANILCA, the party is entitled to initiate a private contest upon receipt of notice of BLM's intent to grant the Native allotment.

When the decision holding the Native allotment application for approval also rejects a selection application filed pursuant to ANCSA, and affords the Native village corporation the opportunity to initiate

CONVEYANCES--Continued

GENERALLY--Continued

a private contest, the Native village corporation has a choice regarding how to continue its objections to the approval of the Native allotment application. It may initiate a private contest or allow the decision to become final and appeal from that decision. If it elects to file a private contest, it is not required to pursue an appeal.

A conveyance to a Native corporation under ANSCA is subject to valid existing rights. A conflicting application based on settlement and occupancy maintained under laws leading to acquisition of title is properly excluded from an ANSCA conveyance.

Kootznoowoo, Inc. v. Heirs of Jimmie Johnson, 109 IBLA 128 (June 8, 1989)

RESERVATIONS

Where land has been conveyed to the United States reserving to the grantors the exclusive right to prospect for and exploit the oil and gas underlying the land and that reservation has been extended beyond its initial term by production, in accordance with the terms of the deed, the United States has, during the extended term, no interest in any of that oil and gas sufficient to form the basis for claiming compensatory royalty because of drainage.

Doris Slaaten, 107 IBLA 16 (Jan. 25, 1989)

This Board will affirm a BLM decision consenting to directional drilling of an oil and gas well spudded on state lands, drilled through lands described in a Federal lease, and bottomed on private lands when there is a showing that the consent is conditioned upon taking steps to prevent unnecessary or unreasonable interference with the right of the Federal lessee.

M. J. Harvey, Jr., 109 IBLA 31 (May 25, 1989)

CONVEYANCES--Continued

RESERVATIONS--Continued

An oil and gas lease offer for acquired land located in the State of Michigan, which was filed on Oct. 18, 1985, is properly rejected due to premature filing where, in a warranty deed dated Oct. 18, 1935, passing title to the surface estate to the United States, the minerals were reserved in the grantor "until Fifty (50) years from date of this instrument," since the minerals did not vest in the United States until Oct. 19, 1985, according to the general rule applicable in Michigan, that when computing the time within which an action is to take place, the first day is excluded and the last day included.

Wilfred Plomis, 110 IBLA 11 (July 5, 1989)

COURTS

Where a Federal district court issues a preliminary injunction which has the effect of reinstating the terms of a revoked reclamation withdrawal, which had precluded the location of mining claims, a mining claim located the day before the effective date of the preliminary injunction is not null and void ab initio, since on the date of location, the lands were open to the operation of the mining laws.

Harold Bennett et al., 107 IBLA 291 (Feb. 24, 1989)

Where a Federal district court issues a preliminary injunction which has the effect of suspending the termination of a multiple-use classification which segregated the land from mineral entry, thereby reinstating the terms of the classification, a mining claim subsequently located on land subject to that injunction is properly declared null and void ab initio.

Art Marinaccio, 107 IBLA 303 (Mar. 2, 1989)

DELEGATION OF AUTHORITY

The Secretary of the Interior has traditionally delegated the responsibility for determining the existence and extent of a KGS to his technical experts in the field. When a technical expert makes a determination that lands qualify for inclusion in a KGS, the Secretary is entitled to rely upon his reasoning. On the other hand, the determination of whether the lands are properly included in a KGS is largely dependent upon factual interpretation, and when there is a material issue of fact determinative of the issues posed, this Board has the discretionary authority to order a hearing on the matter before an Admininstrative Law Judge pursuant to 43 CFR 4.415.

Harry Ptasynski, 107 IBLA 197 (Feb. 15, 1989)

Where a decision of the Director, Minerals Management Service, is approved by an Assistant Secretary, the decision is final for the Department and the Board of Land Appeals lacks jurisdiction to review either the substance thereof or the procedures followed in issuing the decision.

Marathon Oil Co., 108 IBLA 177 (Apr. 12, 1989)

The Secretary of the Interior may delegate to subordinate officials the authority to approve tribal ordinances granted to him in tribal constitutions.

Fort McDermitt Paiute Shoshone Tribe v. Acting Phoenix Area Director, Bureau of Indian Affairs, 17 IBIA 144 (June 21, 1989)

DESERT LAND ENTRY

APPLICATIONS

Under the preliminary injunction order issued in Nat'l Wildlife Federation v. Burford, Civ. No. 85-2238

DESERT LAND ENTRY--Continued

APPLICATIONS--Continued

(D.D.C. Feb. 10, 1986), BLM was precluded from terminating powersite classifications and restoring lands described in a desert land entry application.

James A. Malesky (On Reconsideration), 106 IBLA 327 (Jan. 9, 1989)

A decision to reject a desert land entry application because the lands identified in the application cannot be farmed as an economically feasible operating unit will be affirmed where the record supports such a conclusion and appellant has failed to provide evidence which would establish error in the BLM decision.

Sally Ann Lana Henderson, Donald James Henderson, 107 IBLA 193 (Feb. 14, 1989)

The death of an applicant for a desert land entry will cause the application to lapse and, hence, where an applicant dies during the course of an appeal from rejection of his application, the appeal is properly dismissed as moot.

A BLM decision rejecting a desert land entry application because it is considered not economically feasible to farm the land applied for based on a computer projection may be set aside and the case remanded where the applicant alleges facts which would tend to support a different conclusion and the BLM analysis has failed to consider relevant aspects of appellant's plan of development.

Leroy R. Davis, Susan H. Davis, 107 IBLA 204 (Feb. 16, 1989)

Rejection of a desert land entry application on the grounds that the lands applied for are not a viable economic unit will be set aside and the case remanded for readjudication when BLM fails to consider the applicant's proposal to use an existing well or the equipment he has on hand or the crops he plans to plant.

G. V. (Pete) Cope, 109 IBLA 226 (June 16, 1989)

DESERT LAND ENTRY--Continued

DISTRIBUTION SYSTEM

To obtain equitable adjudication pursuant to 43 CFR 1871.1-1, a desert land entryman is required to show substantial compliance with requirements for providing an adequate water supply and distribution system for his desert land entry. Failure to show substantial compliance with reclamation requirements requires rejection of a petition for equitable adjudication of the entry.

Failure to show that substantial compliance with reclamation requirements of the Desert Land Entry Act was prevented by accident, mistake, or some circumstance beyond the control of the entryman requires rejection of a petition for equitable adjudication and cancellation of the entry.

James M. Mills, 108 IBLA 155 (Apr. 10, 1989)

EXTENSION OF TIME

An application for an extension of time to make final proof, as authorized by the Act of Mar. 28, 1908, 43 U.S.C. § 333 (1982), is not properly rejected solely because it was made during the course of the final proof meeting at the conclusion of the entry.

Anna R. Williams, Frances L. Roylance, 108 IBLA 88 (Mar. 28, 1989)

Where a desert land entryperson is allowed only one extension of time to file final proof under each of three statutes (43 U.S.C. §§ 333, 334, and 336 (1982)), and has received those three extensions, a further request must be denied, regardless of the authority cited by BLM in granting the extensions, because no further authority exists for approving extensions.

Where a desert land entryperson claims reliance on incorrect citations in BLM decisions granting extensions of time to file final proof, in order to claim the existence of authority for a further extension of time, such reliance clearly cannot create any rights not authorized by law.

Elaine S. Stickelman, 108 IBLA 392 (May 22, 1989)

DESERT LAND ENTRY--Continued

WATER SUPPLY

To obtain equitable adjudication pursuant to 43 CFR 1871.1-1, a desert land entryman is required to show substantial compliance with requirements for providing an adequate water supply and distribution system for his desert land entry. Failure to show substantial compliance with reclamation requirements requires rejection of a petition for equitable adjudication of the entry.

Failure to show that substantial compliance with reclamation requirements of the Desert Land Entry Act was prevented by accident, mistake, or some circumstance beyond the control of the entryman requires rejection of a petition for equitable adjudication and cancellation of the entry.

James M. Mills, 108 IBLA 155 (Apr. 10, 1989)

EMINENT DOMAIN

When private property is taken by the United States, just compensation payable to the landowner is properly reduced by the value of benefits accruing to the landowner's remaining property as a result of the taking.

Utu Utu Gwaitu Paiute Tribe of the Benton Paiute Reservation v. Area Director, Sacramento Area Office, Bureau of Indian Affairs, 17 IBIA 78 (Feb. 22, 1989)

ENVIRONMENTAL POLICY ACT

The categorical exclusion found at 516 DM 6, Appendix 5.4D(2)(d), exempting APD approval from the NEPA process, applies only to exploratory wells and not to development wells.

Where an environmental assessment prepared for consideration of an APD is deficient in its discussion of possible effects of the proposed action on wildlife, fails to discuss relevant mitigation measures, and does

ENVIRONMENTAL POLICY ACT--Continued

not document the reasons why it rejects various alternatives to the proposed action, approval of the APD based on such an environmental assessment must be set aside.

Under the decision of the Court of Appeals for the Tenth Circuit in Park County Resource Council, Inc. v. United States Department of Agriculture, 817 F.2d 609 (1987), where an initial exploratory well has been successfully drilled and a lessee files an APD for additional development wells, the filing of the APD triggers the requirement for an Environmental Impact Statement, unless an Environmental Impact Statement has already been prepared which analyzes the impacts that can be expected from full field development.

Michael Gold et al., 108 IBLA 231 (Apr. 24, 1989)

A determination that a proposed action will not have a significant impact on the quality of the human environment will be affirmed on appeal if the record establishes that a careful review of environmental problems has been made, relevant areas of environmental concern have been identified, and the final determination is reasonable. The party challenging a determination must show that the determination was premised on a clear error of law, a demonstrable error of fact, or that the analysis failed to consider a substantial question of material significance to the action for which the analysis was prepared. Mere differences of opinion provide no basis for reversal if BLM's decision is reasonable and supported by the record on appeal.

Hoosier Environmental Council, 109 IBLA 160 (June 8, 1989)

ENVIRONMENTAL QUALITY

ENVIRONMENTAL STATEMENTS

A determination that a proposed action will not have a significant impact on the quality of the human environment will be affirmed on appeal if the record establishes that a careful review of environmental problems has been made, relevant areas of environmental concern have been identified, and the final determination is reasonable. The party challenging

ENVIRONMENTAL QUALITY--Continued

ENVIRONMENTAL STATEMENTS--Continued

a determination must show that the determination was premised on a clear error of law, a demonstrable error of fact, or that the analysis failed to consider a substantial environmental question of material significance to the action for which the analysis was prepared. Mere differences of opinion provide no basis for reversal if BLM's decision is reasonable and supported by the record on appeal.

The Sierra Club, Inc., et al., 107 IBLA 96 (Feb. 1, 1989)

Hoosier Environmental Council, 109 IBLA 160 (June 8, 1989)

A BLM decision approving an application for a permit to drill within a designated resource protection zone surrounding units of the Hovenweep National Monument will be reversed where, in the course of its assessment of the environmental impact of proposed drilling and associated road improvement activity, BLM failed to consider the potential cumulative impact of such activity in conjunction with other existing and proposed drilling and production of wells and associated road improvement activity within the protection zone.

Colorado Environmental Coalition et al., 108 IBLA 10 (Mar. 20, 1989)

The Desert Tortoise Habitat Management Plan is a document designed to guide and control future management actions and does not take specific action or implement a decision or action. The "management actions" it identifies are not the type of specific actions or land-use decisions which are appealable to the Board.

California Ass'n of Four Wheel Drive Clubs, Inc., 108 IBLA 140 (Apr. 3, 1989)

ENVIRONMENTAL QUALITY--Continued

ENVIRONMENTAL STATEMENTS--Continued

The categorical exclusion found at 516 DM 6, Appendix 5.4D(2)(d), exempting APD approval from the NEPA process, applies only to exploratory wells and not to development wells.

Where an environmental assessment prepared for consideration of an APD is deficient in its discussion of possible effects of the proposed action on wildlife, fails to discuss relevant mitigation measures, and does not document the reasons why it rejects various alternatives to the proposed action, approval of the APD based on such an environmental assessment must be set aside.

Under the decision of the Court of Appeals for the Tenth Circuit in Park County Resource Council, Inc. v. United States Department of Agriculture, 817 F.2d 609 (1987), where an initial exploratory well has been successfully drilled and a lessee files an APD for additional development wells, the filing of the APD triggers the requirement for an Environmental Impact Statement, unless an Environmental Impact Statement has already been prepared which analyzes the impacts that can be expected from full field development.

Michael Gold et al., 108 IBLA 231 (Apr. 24, 1989)

EQUAL ACCESS TO JUSTICE ACT

GENERALLY

By regulation, the Department has interpreted the Equal Access to Justice Act to exclude all proceedings except those required by statute to be conducted under 5 U.S.C. § 554 (1982).

Utu Utu Gwaitu Paiute Tribe of the Benton Paiute Reservation v. Sacramento Area Director, Bureau of Indian Affairs, 17 IBIA 141 (June 19, 1989)

EQUAL ACCESS TO JUSTICE ACT--Continued

GENERALLY--Continued

Under the Equal Access to Justice Act, an eligible applicant that has prevailed before the Board in an appeal in which the Government's position clearly was not substantially justified is entitled to attorney fees and other expenses based upon a constructive attorney charge of $75 per hour and upon actual law clerk costs for the hours worked, plus related expenses, despite the fact that the actual legal fees paid by the appellant were determined by a contingent fee arrangement with its attorney, rather than on an hourly basis.

Under the Equal Access to Justice Act, where an eligible prevailing party was not substantially justified, is found to have carefully excluded its unallowable attorney fees and expenses, such as those involving periods preceding, or matters extraneous to, its appeal before the Board; and where both the periods of time charged and the costs claimed as allowable in the proceeding before the Board appear to be reasonable; and where it is clear that the amount being sought as allowable will not compensate the applicant for even the majority of its appeal costs, the Board will exercise its discretion in accepting the fees and expenses applied for as reasonable under the circumstances, without undertaking the detailed inquiry it would normally make.

Application for Attorney Fees of Middlesex Contractors & Riggers, Inc., IBCA-2654-F (Sept. 6, 1989)

Under the Equal Access to Justice Act, an eligible applicant that has prevailed in an adversary adjudication before the Board, may nevertheless not recover its attorney fees, and other expenses connected with such proceedings, where the Government demonstrates that its position was substantially justified, i.e., that it had a reasonable basis in law and fact.

Application for Attorney Fees Appeal of Scalf Engineering Co. & Pike County Construction Co., IBCA-2659-F (Sept. 12, 1989)

EQUAL ACCESS TO JUSTICE ACT--Continued

APPLICATION

Under the Equal Access to Justice Act, an eligible applicant that has prevailed in an adversary adjudication before the Board, may nevertheless not recover its attorney fees, and other expenses connected with such proceedings, where the Government demonstrates that its position was substantially justified, i.e., that it had a reasonable basis in law and fact.

Application for Attorney Fees Appeal of Scalf Engineering Co. & Pike County Construction Co., IBCA-2659-F (Sept. 12, 1989)

AWARDS

In a case where the appellant is a prevailing party on a claim constituting 39.24 percent of the total dollar value of the claims submitted, the applicant is awarded 75 percent of the attorney hours and other expenses claimed where the Board finds that the position of the Government in refusing to pay the appellant's claim in the amount initially submitted had little support in the law or in the facts.

Salisbury & Dietz, Inc. (Application for Attorney Fees), IBCA-2382-F (June 23, 1989) 96 I.D. 280

Under the Equal Access to Justice Act, an eligible applicant that has prevailed before the Board in an appeal in which the Government's position clearly was not substantially justified is entitled to attorney fees and other expenses based upon a constructive attorney charge of $75 per hour and upon actual law clerk costs for the hours worked, plus related expenses, despite the fact that the actual legal fees paid by the appellant were determined by a contingent fee arrangement with its attorney, rather than on an hourly basis.

Under the Equal Access to Justice Act, where an eligible prevailing party was not substantially justified, is found to have carefully excluded its unallowable attorney fees and expenses, such as those involving periods preceding, or matters extraneous to, its appeal before the Board; and where both the periods of time charged and the costs claimed as allowable in the proceeding before the Board appear to be reasonable; and where it is clear that the

EQUAL ACCESS TO JUSTICE ACT--Continued

AWARDS--Continued

amount being sought as allowable will not compensate the applicant for even the majority of its appeal costs, the Board will exercise its discretion in accepting the fees and expenses applied for as reasonable under the circumstances, without undertaking the detailed inquiry it would normally make.

Application for Attorney Fees of Middlesex Contractors & Riggers, Inc., IBCA-2654-F (Sept. 6, 1989)

CONTRACT DISPUTES ACT OF 1978

Allowable Expenses

Upon determining that the inaction of the Government in failing to respond to the contractor's several requests for clarification of defective specifications was unreasonable, the Board holds that the Government has thus failed to establish a substantially justified position. Further, the Board holds: that it has no authority, under the EAJA, to allow an award for attorney fees in excess of $75 per hour, in the absence of an agency regulation providing otherwise; that the EAJA excludes the allowance of costs for lay witnesses; that docket fees not paid are not allowable; and that photocopying charges not shown to be necessary in the preparation and presentation of the underlying litigation will not be allowed as excessive and unreasonable.

Application of James W. Sprayberry Construction for Costs, Fees, & Expenses, IBCA-2298-F (May 4, 1989) 96 I.D. 194

Where, in the underlying proceeding, involving a 90-day contract to furnish five C-119 aircraft for firefighting purposes in Alaska, the Board concluded that a 3-week delay for an airworthiness inspection ordered by the contracting officer constituted a suspension of work for an unreasonable period, and such conclusion was based on findings that the contractor's aircraft were airworthy, that the inspection was for the convenience of the Government, and not based on the fault or negligence of the contractor, the Board holds that the Government failed to sustain its burden of proving substantial justification. Further, the Board holds that under the EAJA, Sec. 5, Title 5, United States Code, it has no authority to award attorney fees in excess of $75 per hour, or to award

EQUAL ACCESS TO JUSTICE ACT--Continued

CONTRACT DISPUTES ACT OF 1978--Continued

Allowable Expenses--Continued

costs for travel or other expenses which cannot fit into one of the categories itemized in (b)(1)(A) of said section.

Application of Hawkins & Powers Aviation, Inc., for Fees & Other Expenses, IBCA-2243-F (July 21, 1989) 96 I.D. 324

Prevailing Party

In a case where the appellant is a prevailing party on a claim constituting 39.24 percent of the total dollar value of the claims submitted, the applicant is awarded 75 percent of the attorney hours and other expenses claimed where the Board finds that the position of the Government in refusing to pay the appellant's claim in the amount initially submitted had little support in the law or in the facts.

Salisbury & Dietz, Inc. (Application for Attorney Fees), IBCA-2382-F (June 23, 1989) 96 I.D. 280

Substantially Justified

Upon determining that the inaction of the Government in failing to respond to the contractor's several requests for clarification of defective specifications was unreasonable, the Board holds that the Government has thus failed to establish a substantially justified position. Further, the Board holds: that it has no authority, under the EAJA, to allow an award for attorney fees in excess of $75 per hour, in the absence of an agency regulation providing otherwise; that the EAJA excludes the allowance of costs for lay witnesses; that docket fees not paid are not allowable; and that photocopying charges not shown to be necessary in the preparation and presentation of the underlying litigation will not be allowed as excessive and unreasonable.

Application of James W. Sprayberry Construction for Costs, Fees, & Expenses, IBCA-2298-F (May 4, 1989) 96 I.D. 194

EQUAL ACCESS TO JUSTICE ACT--Continued

CONTRACT DISPUTES ACT OF 1978--Continued

Substantially Justified--Continued

Where, in the underlying proceeding, involving a 90-day contract to furnish five C-119 aircraft for firefighting purposes in Alaska, the Board concluded that a 3-week delay for an airworthiness inspection ordered by the contracting officer constituted a suspension of work for an unreasonable period, and such conclusion was based on findings that the contractor's aircraft were airworthy, that the inspection was for the convenience of the Government, and not based on the fault or negligence of the contractor, the Board holds that the Government failed to sustain its burden of proving substantial justification. Further, the Board holds that under the EAJA, Sec. 5, Title 5, United States Code, it has no authority to award attorney fees in excess of $75 per hour, or to award costs for travel or other expenses which cannot fit into one of the categories itemized in (b)(1)(A) of said section.

Application of Hawkins & Powers Aviation, Inc., for Fees & Other Expenses, IBCA-2243-F (July 21, 1989) 96 I.D. 324

EQUITABLE ADJUDICATION

SUBSTANTIAL COMPLIANCE

To obtain equitable adjudication pursuant to 43 CFR 1871.1-1, a desert land entryman is required to show substantial compliance with requirements for providing an adequate water supply and distribution system for his desert land entry. Failure to show substantial compliance with reclamation requirements requires rejection of a petition for equitable adjudication of the entry.

Failure to show that substantial compliance with reclamation requirements of the Desert Land Entry Act was prevented by accident, mistake, or some circumstance beyond the control of the entryman requires rejection of a petition for equitable adjudication and cancellation of the entry.

James M. Mills, 108 IBLA 155 (Apr. 10, 1989)

EQUITABLE ADJUDICATION--Continued

SUBSTANTIAL COMPLIANCE--Continued

Where substantial compliance is a prerequisite for the invocation of equitable adjudication, the principle is not applicable to a mining claim deemed abandoned and void for failure to timely submit the annual filing required under sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1982), because, as the Supreme Court in Locke v. United States, 471 U.S. 84 (1985), held, there is no possibility of substantial compliance where the claimant has failed to comply with the deadline established by Congress. Further, the fact that Congress made sec. 314 self-operative and did not provide the Department with the authority to waive the statutory consequences for failure to comply, dispels the view that Congress intended for a claim deemed abandoned and void to be eligible for reinstatement under some other avenue.

Basic Rock & Sand, Inc. (On Reconsideration), 110 IBLA 1 (July 5, 1989)

ESTOPPEL

The application of the doctrine of equitable estoppel against the Federal Government is justified only if doing so does not interfere with underlying Government policies or unduly undermine the correct enforcement of a particular law or regulation.

Wyodak Resources Development Corp., 106 IBLA 339 (Jan. 12, 1989)

An essential element of a claim for estoppel is that the party asserting it must be ignorant of the true facts. Since, however, all persons are presumed to have knowledge of relevant statutory and regulatory provisions, estoppel will not lie when the legal consequences of an action are clearly set forth in statute and/or regulation.

Terra Resources, Inc., 107 IBLA 10 (Jan. 24, 1989)

ESTOPPEL--Continued

The acceptance of a mining claim filing for recordation does not preclude BLM from subsequently declaring the claim to be null and void ab initio upon a finding that the land on which the claim was located was withdrawn from the location of mining claims at the time the claim was located.

Robert L. Payne et al., 107 IBLA 71 (Jan. 30, 1989)

The authority of the United States to enforce a public right or protect a public interest is not vitiated or lost by laches, neglict of duty, failure to act, or delays in the performance of duties.

Mallon Oil Co., 107 IBLA 150 (Feb. 10, 1989)

Estoppel will not lie against the Government to preclude collection of late payment charges where a coal lessee allegedly makes royalty payments based on the erroneous advice of a Government employee concerning the royalty rate, but the record shows that the lessee was not ignorant of the true facts concerning the effective date of a new royalty rate.

Utah International, Inc., 107 IBLA 217 (Feb. 21, 1989)

Employees of the executive branch, including BLM, have no authority to depart from the requirements of statutes dealing with public lands. All citizens are deemed to have knowledge of such statutes. Thus, even though a coal lessee was erroneously advised by BLM that his coal lease would be subject to readjustment in 1999 rather than in 1989, the Government is not estopped from readjusting the lease in 1989 as provided by statute.

Chevron U.S.A., Inc., The Pittsburgh & Midway Coal Mining Co., 108 IBLA 96 (Mar. 29, 1989)

ESTOPPEL--Continued

Where a desert land entryperson claims reliance on incorrect citations in BLM decisions granting extensions of time to file final proof, in order to claim the existence of authority for a further extension of time, such reliance clearly cannot create any rights not authorized by law.

Elaine S. Stickelman, 108 IBLA 392 (May 22, 1989)

The United States is not barred by the equitable defense of estoppel from enforcing public land laws. Moreover, BLM owes no duty to mining claimants to promptly ascertain the legal status of every claim filed and inform such claimants of its findings.

Kenneth Russell, 109 IBLA 180 (June 9, 1989)

BLM is not required under the doctrine of either bona fide rights or equitable estoppel to accept a line which has been surveyed on the ground with appropriate monumentation but which has never been officially approved by BLM, even where private landowners may have relied on the monuments in purchasing land and constructing improvements.

First American Title Insurance Co. v. Bureau of Land Management, Fort Mojave Indian Tribe (Intervenor), 110 IBLA 25 (July 7, 1989)

EVIDENCE

GENERALLY

A holder of a noncompetitive oil and gas lease who challenges a determination that certain lands are within the known geologic structure of a producing oil or gas field has the burden of establishing that the determination is in error. Where the record establishes that the Secretary's technical expert has made a reasoned analysis of the available geological data, the Secretary is entitled to rely upon his

EVIDENCE--Continued

GENERALLY--Continued

expert's professional opinion, absent a showing of error by a preponderance of the evidence.

Celeste C. Grynberg, 107 IBLA 143 (Feb. 7, 1989)

By regulation 43 CFR 3833.0-5(m), the Department considers affidavits of annual assessment work or notices of intention to hold to be timely filed if placed in an envelope postmarked by the U.S. Postal Service on or before Dec. 30 and received in the proper BLM office on or before the following Jan. 19. Where the record shows that a mining claimant utilized the U.S. Postal Service to deliver his affidavit of assessment work and that it was received by the proper BLM office on Jan. 6, 1986, but the record does not contain the envelope in which the affidavit was sent, the mining claimant will not be required to bear the consequences of BLM's failure to retain the envelope, and a decision declaring the claim abandoned and void will be reversed.

Gary Hennis, 108 IBLA 121 (Mar. 30, 1989)

Evidence that a mining claimant possesses a return receipt card or certified mail receipt indicating there was a timely filing of a document with BLM serves to rebut the presumption of nonfiling which is customarily applied where BLM's records indicate a required filing has not occurred, absent a showing by BLM that the claimant filed any other document on that date. Although the nature of the document received by BLM is not described on the receipt or card, the existence of this proof indicates it is more probable than not that the required document was received by BLM.

Sydney Green, 109 IBLA 19 (May 24, 1989)

Where BLM prepares a Technical Mineral Report for purposes of evaluation, based upon geologic considerations, of the extent of known gilsonite deposits, the Secretary is entitled to rely upon the expertise of his

EVIDENCE--Continued

GENERALLY--Continued

technical experts, and absent showing of error by a preponderance of the evidence, a mere difference of opinion with the expert will not suffice to reverse the reasonsed opinions of the Secretary's technical staff.

Where appellant attempted to show error in a Technical Mineral Report prepared by BLM by alleging inconsistency in the report, by allenging that as a basis for its report, BLM used criteria applicable to the coal mining industry and not appropriate to the gilsonite industry, and by arguing that BLM's choices of parameters for competitive leasing are not based in fact; and where appellant submitted no proof other than an affidavit by its president, which did not indicate any basis in geologic analysis, appellant did not establish error in the Bureau's report by a preponderance of the evidence, and the Secretary was entitled to rely upon the reasoned opinions of his technical expert.

American Gilsonite, 111 IBLA 1 (Sept. 19, 1989)
96 I.D. 408

BURDEN OF PROOF

There is a legal presumption that administrative officials have properly discharged their duties and not lost or misplaced legally significant documents properly filed with them. This presumption is not rebutted where appellant asserts that royalty checks were timely mailed, but the checks were not cashed and there is no evidence the checks were received by Minerals Management Service.

Nahama & Weagant Energy Co., 108 IBLA 209 (Apr. 19, 1989)

PREPONDERANCE

A person challenging a Departmental determination that lands are within a KGS has the burden of showing by a preponderance of the evidence that the determination is in error. To establish the preponderance of the evidence means to prove that something is more likely so than not; in other words, "the preponderance of the evidence" means such evidence, when considered

EVIDENCE--Continued

PREPONDERANCE--Continued

and compared with the opposite to it, has more convincing force and produces in your mind's belief that what is sought to be proved is more likely to be true than not.

The Secretary of the Interior has traditionally delegated the responsibility for determining the existence and extent of a KGS to his technical experts in the field. When a technical expert makes a determination that lands qualify for inclusion in a KGS, the Secretary is entitled to rely upon his reasoning. On the other hand, the determination of whether the lands are properly included in a KGS is largely dependent upon factual interpretation, and when there is a material issue of fact determinative of the issues posed, this Board has the discretionary authority to order a hearing on the matter before an Admininstrative Law Judge pursuant to 43 CFR 4.415.

Harry Ptasynski, 107 IBLA 197 (Feb. 15, 1989)

When the Government contests mining claims on a charge of lack of discovery of a valuable mineral deposit, it has the burden of going forward with sufficient evidence to establish a prima facie case as to that charge; however, the mining claimant has the ultimate burden of refuting the Government's case by a preponderance of the evidence.

United States v. Charles M. Crawford, dba Casi Mining & Mineral Exploration Co., 109 IBLA 264 (June 16, 1989)

Where BLM prepares a Technical Mineral Report for purposes of evaluation, based upon geologic considerations, of the extent of known gilsonite deposits, the Secretary is entitled to rely upon the expertise of his technical experts, and absent showing of error by a preponderance of the evidence, a mere difference of opinion with the expert will not suffice to reverse the reasonsed opinions of the Secretary's technical staff.

Where appellant attempted to show error in a Technical Mineral Report prepared by BLM by alleging inconsistency in the report, by allenging that as a basis for its report, BLM used criteria applicable to the coal mining industry and not appropriate to the gilsonite industry, and by arguing that BLM's choices of

EVIDENCE--Continued

PREPONDERANCE--Continued

parameters for competitive leasing are not based in fact; and where appellant submitted no proof other than an affidavit by its president, which did not indicate any basis in geologic analysis, appellant did not establish error in the Bureau's report by a preponderance of the evidence, and the Secretary was entitled to rely upon the reasoned opinions of his technical expert.

In determining whether lands are of such character as to subject them to leasing rather than prospecting under permits, absent a showing of error by a preponderance of the evidence, the Secretary is entitled to rely upon the reasoned opinion of his technical experts. A mere difference of opinion will not establish such error.

American Gilsonite, 111 IBLA 1 (Sept. 19, 1989)
96 I.D. 408

When the Board conducts de novo review of a decision of an Administrative Law Judge who erroneously allocated the burden of proof in a private contest proceeding to the applicant for a Native allotment rather than to the contestant, the Board properly reviews the entire record to determine whether the applicant established by a preponderance of the evidence that he satisfactorily proved he was entitled to an allotment.

Ira Wassillie (On Reconsideration), 111 IBLA 53 (Sept. 20, 1989)

PRESUMPTIONS

There is a legal presumption that administrative officials have properly discharged their duties and not lost or misplaced legally significant documents properly filed with them. This presumption is not rebutted where appellant asserts that royalty checks were timely mailed, but the checks were not cashed and there is no evidence the checks were received by Minerals Management Service.

Nahama & Weagant Energy Co., 108 IBLA 209 (Apr. 19, 1989)

EVIDENCE--Continued

PRESUMPTIONS--Continued

The legal presumption that administrative officials have properly discharged their duties and not lost or misplaced documents filed with them is rebuttable by probative evidence to the contrary. The presumption is not overcome by a statement, without corroborating evidence, that a document was mailed, or by evidence that the claimant timely recorded a copy with the local recording office.

Donald G. Sterner, 109 IBLA 76 (May 30, 1989)

Daniel D. Draper, 109 IBLA 85 (May 31, 1989)

PRIMA FACIE CASE

When the Government contests mining claims on a charge of lack of discovery of a valuable mineral deposit, it has the burden of going forward with sufficient evidence to establish a prima facie case as to that charge; however, the mining claimant has the ultimate burden of refuting the Government's case by a preponderance of the evidence.

United States v. Charles M. Crawford, dba Casi Mining & Mineral Exploration Co., 109 IBLA 264 (June 16, 1989)

SUFFICIENCY

Where it appears that occupancy of a homesite in Alaska began in Sept. 1983, calculation of years of occupancy must commence with that date. There is no requirement that occupancy for purposes of establishing a homesite claim pursuant to 43 U.S.C. § 687a (1982), be continuous throughout any given calendar year.

Kim M. Cook v. Mary Frances DeHart Buren, 106 IBLA 294 (Jan. 5, 1989)

EVIDENCE--Continued

SUFFICIENCY--Continued

There is a legal presumption that administrative officials have properly discharged their duties and not lost or misplaced legally significant documents properly filed with them. This presumption is not rebutted where appellant asserts that royalty checks were timely mailed, but the checks were not cashed and there is no evidence the checks were received by Minerals Management Service.

Nahama & Weagant Energy Co., 108 IBLA 209 (Apr. 19, 1989)

BLM may properly cancel a private maintenance and care agreement for a wild horse and repossess the horse where there is sufficient evidence of improper care of the adopted horse to establish that the adopter violated the terms of the agreement.

Grant F. Morey, 108 IBLA 354 (May 12, 1989)

The legal presumption that administrative officials have properly discharged their duties and not lost or misplaced documents filed with them is rebuttable by probative evidence to the contrary. The presumption is not overcome by a statement, without corroborating evidence, that a document was mailed, or by evidence that the claimant timely recorded a copy with the local recording office.

Donald G. Sterner, 109 IBLA 76 (May 30, 1989)

Daniel D. Draper, 109 IBLA 85 (May 31, 1989)

FEDERAL EMPLOYEES AND OFFICERS

GENERALLY

Where the reasonable rental value of Government-furnished quarters has been determined in accordance with accepted appraisal procedures pursuant to Departmental directives, and the occupants allege that the rent is unjust, the burden is upon them to prove by

FEDERAL EMPLOYEES AND OFFICERS--Continued

GENERALLY--Continued

positive, specific, and substantial evidence that the appraisal is in error.

In the Matter of the Quarters Rental Rate Appeals of Employees Living at the Glenwood Ranger Station, 8 OHA 53 (Apr. 18, 1989)

In the Matter of the Quarters Rental Rate Appeals of Michael P. Whitelaw, Linda G. Brown, Joseph L. Finley, Bill Schoenleber, & Richard Arnoux, 8 OHA 74 (June 20, 1989)

Where the reasonable rental value of Government-furnished quarters has been determined in accordance with accepted appraisal procedures pursuant to Departmental directives, and the occupant alleges that the rent is unjust, the burden is upon the occupant to prove by positive, specific, and substantial evidence that the appraisal is in error.

In the Matter of the Quarters Rental Rate Appeal of Mr. James K. Steele, 8 OHA 60 (May 11, 1989)

AUTHORITY TO BIND GOVERNMENT

The application of the doctrine of equitable estoppel against the Federal Government is justified only if doing so does not interfere with underlying Government policies or unduly undermine the correct enforcement of a particular law or regulation.

Wyodak Resources Development Corp., 106 IBLA 339 (Jan. 12, 1989)

Employees of the executive branch, including BLM, have no authority to depart from the requirements of statutes dealing with public lands. All citizens are deemed to have knowledge of such statutes. Thus, even though a coal lessee was erroneously advised by BLM that his coal lease would be subject to readjustment in 1999 rather than in 1989, the Government is not

FEDERAL EMPLOYEES AND OFFICERS--Continued

AUTHORITY TO BIND GOVERNMENT--Continued

estopped from readjusting the lease in 1989 as provided by statute.

Chevron U.S.A., Inc., The Pittsburgh & Midway Coal Mining Co., 108 IBLA 96 (Mar. 29, 1989)

Unauthorized acts by an employee of the Bureau of Indian Affairs cannot serve as the basis for conferring rights not authorized by law.

Roberta C. Weckeah Bradley v. Anadarko Area Director, Bureau of Indian Affairs, 17 IBIA 210 (Aug. 2, 1989)

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976

GENERALLY

Where, in response to an inquiry from BLM regarding the exact situs of a mining claim, the claimant submits a professional survey map, along with a copy of a master title plat upon which the location of the claim has been depicted, BLM may rely on those documents to determine the location of the mining claim.

Kenneth Russell, 109 IBLA 180 (June 9, 1989)

ASSESSMENT WORK

Under 43 U.S.C. § 1744 (1982), the owner of an unpatented mining claim must file evidence of annual assessment work or a notice of intention to hold the claim prior to Dec. 31 of each year. Such filings must be made within each calendar year, i.e., on or after Jan. 1 and on or before Dec. 30. Failure to file within the calendar year properly results in the claim being deemed abandoned and void. Congress assigned the owner of the mining claim the responsibility of making the filings required by 43 U.S.C. § 1744 (1982), and the owner must bear the consequence of filings not timely made. The pendency of contest or condemnation proceedings does not excuse a claim owner from the statutory filing requirements. BLM has no affirmative obligation to send a mining claim owner

ASSESSMENT WORK--Continued

a reminder notice concerning the need to make annual filings required by 43 U.S.C. § 1744 (1982).

Jean Emanuel Hatton, Eva M. Pool, Phillip Emanuel, 107 IBLA 47 (Jan. 27, 1989)

Evidence that a mining claimant possesses a return receipt card or certified mail receipt indicating there was a timely filing of a document with BLM serves to rebut the presumption of nonfiling which is customarily applied where BLM's records indicate a required filing has not occurred, absent a showing by BLM that the claimant filed any other document on that date. Although the nature of the document received by BLM is not described on the receipt or card, the existence of this proof indicates it is more probable than not that the required document was received by BLM.

Sydney Green, 109 IBLA 19 (May 24, 1989)

CORRECTION OF CONVEYANCE DOCUMENTS

The Secretary has the authority to issue corrective patents when necessary to eliminate errors. A party seeking a corrective patent initiates the proceeding by filing an application asserting ownership of lands described in and based upon a patent or other document containing an alleged error. However, when the error does not lie in the patent or other document under which the applicant is asserting ownership, but lies in a patent issued to another party, the Secretary does not have authority to correct the other party's patent.

Genaro M. Roybal, 107 IBLA 75 (Jan. 30, 1989)

RECORDATION OF AFFIDAVIT OF ASSESSMENT WORK OR NOTICE OF INTENTION TO HOLD MINING CLAIM

The Department has long followed the rule that transmission of a document to a party's last address of record by registered or certified mail, return receipt requested, constitutes constructive service even though delivery was unsuccessful. However, a party may defeat application of the rule by showing

RECORDATION OF AFFIDAVIT OF ASSESSMENT WORK OR NOTICE OF INTENTION TO HOLD MINING CLAIM--Continued

error in Postal Service procedure amounting to negligence in transmitting the decision.

David Robertson, 107 IBLA 114 (Feb. 2, 1989)

Unless a final certificate has been issued, an applicant for a patent to mining claim is not excused under 43 CFR 3833.2-4 from the requirement to file annually an affidavit of assessment work or notice of intention to hold the claim with BLM under 43 U.S.C. § 1744 (1982).

The purchase price for lands covered by an application for mineral patent is not properly submitted until after it is established that no adverse claim or other objection appears. Where the record establishes that there were significant problems with a patent application requiring resolution before purchase money could properly be tendered and final certificate issued, the premature payment and acceptance of mineral patent purchase price neither creates any right to receive certificate of title nor lifts the obligation to comply with the recordation provisions of the Federal Land Policy and Management Act of 1976.

BLM properly rejects a patent application for mining claims which have become invalid because the claimant failed to file a copy of his affidavit of assessment work as required by 43 U.S.C. § 1744 (1982).

U. A. Small, 108 IBLA 102 (Mar. 29, 1989)

The owner of an unpatented mining claim located on public land is required by 43 U.S.C. § 1744 (1982), and 43 CFR 3833.2 to file evidence of assessment work performed or a notice of intention to hold with the proper BLM office on or before Dec. 30 of each calendar year. By regulation 43 CFR 3833.0-5(m), the Department considers such documents to be timely filed if placed in an envelope postmarked by the U.S. Postal Service on or before Dec. 30 and received in the proper BLM office on or before the following Jan. 19. Where the record shows

compliance with that regulation, a BLM decision declaring a claim abandoned and void based on an untimely filing must be reversed.

By regulation 43 CFR 3833.0-5(m), the Department considers affidavits of annual assessment work or notices of intention to hold to be timely filed if placed in an envelope postmarked by the U.S. Postal Service on or before Dec. 30 and received in the proper BLM office on or before the following Jan. 19. Where the record shows that a mining claimant utilized the U.S. Postal Service to deliver his affidavit of assessment work and that it was received by the proper BLM office on Jan. 6, 1986, but the record does not contain the envelope in which the affidavit was sent, the mining claimant will not be required to bear the consequences of BLM's failure to retain the envelope, and a decision declaring the claim abandoned and void will be reversed.

Gary Hennis, 108 IBLA 121 (Mar. 30, 1989)

Under 43 U.S.C. § 1744(a) (1982), as implemented by the provisions of 43 CFR 3833.2-3, the mining claim recordation document filed with the Bureau of Land Management by a mining claimant as a notice of intention to hold the claim must be "an exact legible reproduction or duplicate, except microfilm, of an instrument" which was or will be filed for record with the local recording district. There is no evidence in this case that the documents cited by claimant as notice of intention to hold constitute copies of documents he had filed or intended to file with the local recording district.

Albert H. Corliss, 108 IBLA 152 (Apr. 7, 1989)

The conclusive presumption of abandonment for failure to comply with the recordation requirements of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744(a) (1982), is self-operative and does not depend upon any act or decision of an administrative official. Where a claim is omitted from the express listing of a group of claims for which annual assessment work was performed but was depicted on a map accompanying the affidavit of assessment work, it is

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

RECORDATION OF AFFIDAVIT OF ASSESSMENT WORK OR NOTICE OF INTENTION TO HOLD MINING CLAIM--Continued

wholly a matter of conjecture whether the claim not specifically identified was intended to be listed as the object of assessment work expenditures.

Douglas C. Liechty, 108 IBLA 247 (Apr. 24, 1989)

Where a mining claimant files timely an affidavit of assessment work with BLM as required by sec. 314 of the Federal Land Policy and Management Act of 1976 (43 U.S.C. § 1744(a) (1982)), which is not the affidavit of assessment required to be filed under 43 CFR 3833.2-1, it is a curable defect, and a mining claimant is entitled to notice and a reasonable opportunity to submit the precise instrument.

Where an affidavit of assessment work timely filed with BLM does not include BLM serial numbers as required by 43 CFR 3833.2-2(a)(1), the failure to provide such is curable pursuant to 43 CFR 3833.4, and will not be deemed to invalidate an otherwise sufficient filing under 43 U.S.C. § 1744(a)(2) (1982), absent a showing that the claimant has been given notice and 30 days within which to cure the defect.

Thomas A. Alexander, 108 IBLA 347 (May 12, 1989)

Under sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1982), the owner of an unpatented mining claim located on public land must file a notice of intention to hold the mining claim or evidence of annual assessment work on the claim prior to Dec. 31 of each year in the proper office of the Bureau of Land Management. There is no provision for waiver of this mandatory requirement, and where a notice of intention to hold or evidence of assessment work is not timely filed, for whatever reason, the consequence must be borne by the claimant.

The filing of a quitclaim deed relating to a mining claim does not, standing alone, constitute a notice of intention to hold the mining claim. Such a deed merely evidences present ownership, not an intention to hold in the future.

George McGowan, 109 IBLA 1 (May 22, 1989)

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

RECORDATION OF AFFIDAVIT OF ASSESSMENT WORK OR NOTICE OF INTENTION TO HOLD MINING CLAIM--Continued

Evidence that a mining claimant possesses a return receipt card or certified mail receipt indicating there was a timely filing of a document with BLM serves to rebut the presumption of nonfiling which is customarily applied where BLM's records indicate a required filing has not occurred, absent a showing by BLM that the claimant filed any other document on that date. Although the nature of the document received by BLM is not described on the receipt or card, the existence of this proof indicates it is more probable than not that the required document was received by BLM.

Sydney Green, 109 IBLA 19 (May 24, 1989)

BLM may properly declare an unpatented mining claim abandoned and void when a claimant fails to file either evidence of annual assessment work or a notice of intent to hold the claim on or before Dec. 30 of a calendar year.

The provisions of 43 CFR 3833.4(b) apply to the filing of supplemental information not specifically called for in 43 U.S.C. § 1744 (1982), and the filing of notices of intention to hold millsites and tunnel site claims. The latitude set out in 43 CFR 3833.4(b) is not available if no annual filing has been made for a lode or placer mining claim, and, in such case, the Department is without authority to allow a 30-day period after notice for a claimant to file the required documents.

David R. Jacques, 109 IBLA 69 (May 30, 1989)

Failure to file in the proper Bureau of Land Management office either evidence of assessment work performed or notice of intention to hold as required by 43 U.S.C. § 1744 (1982), and 43 CFR 3833.2 within the time period prescribed results in a conclusive presumption of abandonment of the mining claim.

Donald G. Sterner, 109 IBLA 76 (May 30, 1989)

Daniel D. Draper, 109 IBLA 85 (May 31, 1989)

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

RECORDATION OF AFFIDAVIT OF ASSESSMENT WORK OR NOTICE OF INTENTION TO HOLD MINING CLAIM--Continued

Under 43 CFR 3833.0-5(m), "timely filed" means being filed within the time period prescribed by law, or received by Jan. 19, after the period prescribed by law in an envelope bearing a clearly dated postmark affixed by the United States Postal Service within the period prescribed by law. A proof of labor for a mining claim is timely filed when it was received by January 19, at the Nevada State Office and was in an envelope bearing a clearly dated postmark dated Dec. 26, which is within the period prescribed by law, and BLM's decision declaring the claim abandoned and void is properly reversed.

Patrick J. McClain, 109 IBLA 320 (June 21, 1989)

Failure to file in the proper Bureau of Land Management office either evidence of assessment work performed or notice of intention to hold as required by 43 U.S.C. § 1744 (1982), and 43 CFR 3833.2 within the time period prescribed results in a conclusive presumption of abandonment of the mining claim. Only where a patent application has been filed and a final certificate has been issued will a mining claimant be excused under 43 CFR 3833.2-4 from complying with the filing requirement.

B. J. Londo et al., 109 IBLA 353 (June 23, 1989)

Failure to file in the proper Bureau of Land Management office either evidence of work performed or notice of intention to hold as required by 43 U.S.C. § 1744 (1982), and 43 CFR 3833.2 within the time period prescribed results in a conclusive presumption of abandonment of the mining claim. Under 43 CFR 3833.0-5(m), a document which is mailed will be considered timely filed provided it bears a clearly dated postmark affixed by the U.S. Postal Service on or before the filing deadline. Where an envelope received by BLM after the Dec. 30 end of the filing period does not bear a postmark date falling within the filing period,

RECORDATION OF AFFIDAVIT OF ASSESSMENT WORK OR NOTICE OF INTENTION TO HOLD MINING CLAIM--Continued

the regulation will not apply and the filing is therefore untimely.

Chemical Products Corp., 109 IBLA 357 (June 23, 1989)

Where substantial compliance is a prerequisite for the invocation of equitable adjudication, the principle is not applicable to a mining claim deemed abandoned and void for failure to timely submit the annual filing required under sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1982), because, as the Supreme Court in Locke v. United States, 471 U.S. 84 (1985), held, there is no possibility of substantial compliance where the claimant has failed to comply with the deadline established by Congress. Further, the fact that Congress made sec. 314 self-operative and did not provide the Department with the authority to waive the statutory consequences for failure to comply, dispels the view that Congress intended for a claim deemed abandoned and void to be eligible for reinstatement under some other avenue.

Basic Rock & Sand, Inc. (On Reconsideration), 110 IBLA 1 (July 5, 1989)

An unpatented mining claim is properly declared abandoned and void when a claimant fails to file either evidence of annual assessment work or a notice of intent to hold the claim on or before Dec. 30 of a calendar year.

Doyle C. Cape, 110 IBLA 16 (July 6, 1989)

RECORDATION OF MINING CLAIMS AND ABANDONMENT

Under 43 U.S.C. § 1744 (1982), the owner of an unpatented mining claim must file evidence of annual assessment work or a notice of intention to hold the claim prior to Dec. 31 of each year. Such filings must be made within each calendar year, i.e., on or after Jan. 1 and on or before Dec. 30. Failure to file within the calendar year properly results in the claim being deemed abandoned and void. Congress

RECORDATION OF MINING CLAIMS AND ABANDONMENT--Continued

assigned the owner of the mining claim the responsibility of making the filings required by 43 U.S.C. § 1744 (1982), and the owner must bear the consequence of filings not timely made. The pendency of contest or condemnation proceedings does not excuse a claim owner from the statutory filing requirements. BLM has no affirmative obligation to send a mining claim owner a reminder notice concerning the need to make annual filings required by 43 U.S.C. § 1744 (1982).

Jean Emanuel Hatton, Eva M. Pool, Phillip Emanuel, 107 IBLA 47 (Jan. 27, 1989)

Under 43 CFR 3833.0-5(m), "timely filed" means being filed within the time period prescribed by law, or received by Jan. 19, after the period prescribed by law in an envelope bearing a clearly dated postmark affixed by the United States Postal Service within the period prescribed by law. A proof of labor for a mining claim is timely filed when it was received by January 19, at the Nevada State Office and was in an envelope bearing a clearly dated postmark dated Dec. 26, which is within the period prescribed by law, and BLM's decision declaring the claim abandoned and void is properly reversed.

Patrick J. McClain, 109 IBLA 320 (June 21, 1989)

REPEALERS

A mining claim located on lands withdrawn for reclamation purposes under the first form is null and void ab initio. A first-form reclamation withdrawal completed prior to Oct. 21, 1976, remains in effect, subject to review by the Secretary, notwithstanding repeal of the statute authorizing the initiation of such withdrawals.

Leo & Florence Whiteman, 107 IBLA 118 (Feb. 2, 1989)

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

RIGHTS-OF-WAY

BLM properly holds a communications site right-of-way grant for termination where the holder failed to pay the annual rental charges for the first and second years of the grant within 30 days following notification of BLM's determination of the fair market value of the grant for those years.

D. R. Johnson Lumber Co., 106 IBLA 379 (Jan. 19, 1989)

Where BLM has set the annual rental charges for a communications site right-of-way based on an appraisal of the fair market rental value of that site which failed, without adequate justification, to consider a comparable lease of arguable significance, the Board will set aside the decision setting the rental charges and remand for a reappraisal and any necessary recalculation of such charges.

Richard Boulais, dba Private Line Communications, 107 IBLA 109 (Feb. 2, 1989)

An appraisal of fair market rental value for a communication site right-of-way will not be set aside on appeal if an appellant fails to show error in the appraisal methods used or fails to show by convincing evidence that the charges are excessive. In the absence of a preponderance of evidence that a BLM appraisal is erroneous, such an appraisal may be rebutted only by another appraisal.

Where there are multiple users of the same communication site, each user is individually responsible for the fair market rental value of the authorized use of the site.

Chalfont Communications, 108 IBLA 195 (Apr. 13, 1989)

No violation of the National Environmental Policy Act of 1969 occurs upon BLM's issuance of a right-of-way authorizing construction of an all-weather road through the wintering habitat of an elk herd if the environmental impact statement accompanying this action

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

RIGHTS-OF-WAY--Continued

adequately describes the impacts of such road, as mitigated by a seasonal road closure adopted as a part of the right-of-way grant.

The Shoshone-Bannock Tribes, The Wilderness Society et al., 108 IBLA 198 (Apr. 17, 1989)

Under sec. 504(g) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1764(g) (1982), the Secretary of the Interior may charge no rental for a right-of-way only in certain circumstances. The regulation implementing that provision, 43 CFR 2803.1-2(c) (1986), sets forth the circumstances under which BLM is authorized to charge no rental fee and specifically excludes from consideration municipal utilities and cooperatives whose principal source of revenue is customer charges, including a public corporation that develops, stores, and sells water at wholesale to other public water authorities.

Metropolitan Water District of Southern California, 109 IBLA 327 (June 22, 1989)

An appraisal of fair market rental value for a communication site right-of-way will not be set aside on appeal if an appellant fails to show error in the appraisal methods used or fails to show by convincing evidence that the charges are excessive. In the absence of a preponderance of evidence that a BLM appraisal is erroneous, such an appraisal may be rebutted only by another appraisal.

Big Sky Communications, Inc., 110 IBLA 213 (Aug. 21, 1989)

SALES

BLM's failure to send a notice to the co-owner of an adjoining parcel of land as required by 43 CFR 2711.1-2(a) will not vitiate a public sale of the parcel by modified competitive bidding procedure where

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

SALES--Continued

the co-owner had actual knowledge of the sale prior to the sale date and subsequently participated in the sale.

The failure of a high bidder to include proof of United States citizenship with a sealed bid is a curable defect not requiring rejection of a bid submitted pursuant to modified competitive bidding procedures.

Stephen J. Stagnaro et al., 107 IBLA 323 (Mar. 8, 1989)

Under the provisions of 43 CFR 2711.3-3(d) and 43 CFR 2711.3-1(f) and (g), a direct sale of public land may not, as a general rule, be cancelled after BLM has accepted the tender of the purchase price.

"Adjoining landowners." The term "adjoining landowners," as used in 43 CFR 2711.1-2(b), does not include individuals who own cornering lands, since in the administration of the public land laws the terms "contiguous" or "adjoining" have been consistently defined and construed to exclude "cornering" lands.

Henry J. Warmuth, 108 IBLA 130 (Apr. 3, 1989)

WILDERNESS

Where an R.S. 2477 right-of-way is found to exist across public lands for a county road bordering WSAs, the right to maintain and improve that right-of-way, measured by what is reasonable and necessary in light of preexisting uses of the road at the time of repeal of R.S. 2477, constitutes a valid existing right under FLPMA. Notwithstanding this limitation on the authority of BLM, the obligation of BLM under sec. 603(c) of FLPMA to manage the public lands so as to avoid unnecessary and undue degradation of WSAs may require preparation of an environmental assessment with respect to the impact of construction of road improvements proposed by the county to ascertain whether they may involve any unnecessary or undue degratdation to WSAs which would require preparation of an environmental impact statement.

Sierra Club et al., 111 IBLA 122 (Sept. 29, 1989)

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

WITHDRAWALS

A mining claim located on lands withdrawn for reclamation purposes under the first form is null and void ab initio. A first-form reclamation withdrawal completed prior to Oct. 21, 1976, remains in effect, subject to review by the Secretary, notwithstanding repeal of the statute authorizing the initiation of such withdrawals.

Leo & Florence Whiteman, 107 IBLA 118 (Feb. 2, 1989)

FEDERAL OIL AND GAS ROYALTY MANAGEMENT ACT OF 1982

GENERALLY

Sec. 111(a) of the Federal Oil and Gas Royalty Management Act, 30 U.S.C. § 1721(a) (1982), authorizes the collection of interest charges for late payment of oil and gas royalties. Sec. 305 of that Act, 30 U.S.C. § 1701 note (1982), provides that sec. 111 and regulations implemented pursuant thereto apply to oil and gas leases issued prior to the enactment of that Act, unless to do so would be contrary to express and specific provisions of those leases. Where no such provisions exist, the assessment of late payment charges is proper.

The procedural safeguards that apply when civil penalties are levied pursuant to 30 U.S.C. § 1719 (1982), are not applicable to late payment interest charges assessed pursuant to 30 U.S.C. § 1721(a) (1982).

Coastal Oil and Gas Corp., et al., 108 IBLA 62 (Mar. 22, 1989)

ASSESSMENTS

When regulations governing assessments for erroneous reporting of sales and royalty remittance information have been amended to allow lower assessments, the Board may apply those regulations, absent intervening rights or countervailing public policy reasons, where to do so will benefit the appellant.

Forest Oil Corp., 107 IBLA 1 (Jan. 23, 1989)

FEDERAL OIL AND GAS ROYALTY MANAGEMENT ACT OF 1982
--Continued

ASSESSMENTS--Continued

Minerals Management Service is required by law to assess interest (late payment) charges on royalty payments for oil and gas leases which are not received by the date such payments are due.

There is a legal presumption that administrative officials have properly discharged their duties and not lost or misplaced legally significant documents properly filed with them. This presumption is not rebutted where appellant asserts that royalty checks were timely mailed, but the checks were not cashed and there is no evidence the checks were received by Minerals Management Service.

Nahama & Weagant Energy Co., 108 IBLA 209 (Apr. 19, 1989)

ROYALTIES

Minerals Management Service is required by law to assess interest (late payment) charges on royalty payments for oil and gas leases which are not received by the date such payments are due.

There is a legal presumption that administrative officials have properly discharged their duties and not lost or misplaced legally significant documents properly filed with them. This presumption is not rebutted where appellant asserts that royalty checks were timely mailed, but the checks were not cashed and there is no evidence the checks were received by Minerals Management Service.

Nahama & Weagant Energy Co., 108 IBLA 209 (Apr. 19, 1989)

BLM may, in accordance with 43 CFR 3108.2-3(f), reduce the royalty rate for a reinstated lease in three separate circumstances: (1) where it finds undue hardship or premature termination of production would result; (2) where a lessee has expended funds to develop the lease, after the rental was due and not paid, on the basis of any written action of the United States, its agents or employees, which preceded the

FEDERAL OIL AND GAS ROYALTY MANAGEMENT ACT OF 1982
--Continued

ROYALTIES--Continued

expenditure of those funds and was a major consideration in their expenditure; or (3) where it finds it is equitable to do so for any other reason.

Where an oil and gas lessee requests, in accordance with 30 U.S.C. § 188(i)(2) (1982), and 43 CFR 3108.2-3(f), reduction of the increased royalty rate upon reinstatement of its lease on the basis that a written action by BLM preceded and was a major consideration in its expenditure of funds to develop the lands covered by the lease after the rental became due and was not paid, that request is properly denied when the record shows that although the lessee received a letter from BLM after the anniversary date of the lease, that letter did not precede and was not a major consideration in the lessee's expenditure of funds to develop the lands covered by the lease.

Mallon Oil Co., et al., 108 IBLA 241 (Apr. 24, 1989)

When only a part of a producing oil and gas lease is committed to a unit agreement, the uncommitted portion is segregated into a new lease and given a new lease number. An assessment of late payment charges will be reversed where the royalty was timely paid but initially credited to the account of the parent lease rather than a segregated lease created by partial commitment of the parent lease to a unit agreement and the misidentification was the result of delay in notifying the payor of the segregation and the new lease number for the segregated lands.

Phillips Petroleum Co., 108 IBLA 340 (May 9, 1989)

In the absence of a market for oil at the wellhead where production would ordinarily be sold and valued, the deduction of a transportation allowance from the value of the oil at the nearest available market has been allowed. Although the point of first "sale" of oil is generally an indicia of the existence of a market, the substance of a transportation will prevail over form and a decision rejecting a transportation allowance for oil "sold" to a pipeline will be set aside where it appears from the record that the oil was held for the account of the lessee, the lessee received no consideration for "sale" of the oil, the oil was

FEDERAL OIL AND GAS ROYALTY MANAGEMENT ACT OF 1982
--Continued

ROYALTIES--Continued

redelivered to the lessee at the end of the pipeline, and the only consideration paid was a $2.50-per-barrel service charge to the pipeline.

ARCO Oil & Gas Co., 109 IBLA 34 (May 25, 1989)

Sec. 308 of FOGRMA, 30 U.S.C. § 1756 (1982), requiring payment of royalties on oil or gas lost or wasted from a lease site, is applicable to gas vented and flared as a result of a 1985 well blowout on a lease issued prior to enactment of FOGRMA on the Outer Continental Shelf.

Chevron U.S.A. Inc., et al., 110 IBLA 216 (Aug. 23, 1989)

The valuation of natural gas liquid products for purposes of computing the royalty due is required by statute and regulation to be not less than the greater of the fair market value or the gross proceeds realized by the lessee. One of the factors to be considered in assessing fair market value under the regulation governing royalty valuation is posted prices. A determination of fair market value based on posted spot market prices will be sustained as consistent with the regulation in the absence of a showing that this is inconsistent with fair market value.

A policy guideline interpreting the royalty valuation regulation as it applies to natural gas liquid products is properly distinguished from a regulation having the force and effect of law promulgated in accordance with the rulemaking requirements of the Administrative Procedure Act. Although such a policy guideline is not binding on the Board and will not be followed where it is inconsistent with the relevant regulation, it will be upheld by the Board on appeal where it provides a reasonable basis for a decision applying the royalty valuation regulation and is consistent therewith.

In the absence of acceptance of the lessee's royalty valuation as conclusive by an official authorized to bind the Department on this matter, the Department is not barred from rejecting the valuation,

FEDERAL OIL AND GAS ROYALTY MANAGEMENT ACT OF 1982
--Continued

ROYALTIES--Continued

valuing production by another acceptable method, and demanding payment of royalty based on this method.

Where the low-posted spot market price for the month for natural gas liquid products is found by MMS to establish the fair market value floor for royalty valuation, a decision assessing additional royalty charges based on the difference between lessee's reported valuation and the average spot market price will be set aside and remanded.

Conoco Inc., ARCO Oil & Gas Co., 110 IBLA 232 (Aug. 29, 1989)

FEES

Under sec. 504(g) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1764(g) (1982), the Secretary of the Interior may charge no rental for a right-of-way only in certain circumstances. The regulation implementing that provision, 43 CFR 2803.1-2(c) (1986), sets forth the circumstances under which BLM is authorized to charge no rental fee and specifically excludes from consideration municipal utilities and cooperatives whose principal source of revenue is customer charges, including a public corporation that develops, stores, and sells water at wholesale to other public water authorities.

Metropolitan Water District of Southern California, 109 IBLA 327 (June 22, 1989)

An amended regulation governing payment of the cost of publishing the notice of a competitive oil and gas lease sale may be applied to a pending matter where, absent intervening rights or countervailing public policy reasons, the amended regulation will benefit the affected party.

Alvin L. Terry, Jr., 110 IBLA 360 (Sept. 14, 1989)

GEOTHERMAL LEASES

REINSTATEMENT

Neither reasonable diligence nor justification is demonstrated by the holder of a geothermal lease who stops payment on his rental checks because they were drawn on the wrong account and thereafter submits replacement checks which are received by the Minerals Management Service after the anniversary date of the lease, and reinstatement is properly denied.

James P. Miner, Texploration, Inc., 109 IBLA 220 (June 15, 1989)

TERMINATION

Neither reasonable diligence nor justification is demonstrated by the holder of a geothermal lease who stops payment on his rental checks because they were drawn on the wrong account and thereafter submits replacement checks which are received by the Minerals Management Service after the anniversary date of the lease, and reinstatement is properly denied.

James P. Miner, Texploration, Inc., 109 IBLA 220 (June 15, 1989)

GRAZING AND GRAZING LANDS

The failure of a licensee of the Federal range to request grazing privileges or nonuse to the extent of earlier licenses supported by the same base property for 2 consecutive years reduces the qualifications of the base property to the extent that it has not been covered by the requests for 2 consecutive years, even though the qualifications of the base property have not been formally adjudicated.

Estate of Leonard Banegas v. Bureau of Land Management, Elias Salazar, Emma Benegas, & Edward Banegas (Intervenors), 108 IBLA 162 (Apr. 11, 1989)

GRAZING PERMITS AND LICENSES

BASE PROPERTY (LAND)

Dependency by Use

The failure of a licensee of the Federal range to request grazing privileges or nonuse to the extent of earlier licenses supported by the same base property for 2 consecutive years reduces the qualifications of the base property to the extent that it has not been covered by the requests for 2 consecutive years, even though the qualifications of the base property have not been formally adjudicated.

Estate of Leonard Banegas v. Bureau of Land Management, Elias Salazar, Emma Benegas, & Edward Banegas (Intervenors), 108 IBLA 162 (Apr. 11, 1989)

HEARINGS

The Secretary of the Interior has traditionally delegated the responsibility for determining the existence and extent of a KGS to his technical experts in the field. When a technical expert makes a determination that lands qualify for inclusion in a KGS, the Secretary is entitled to rely upon his reasoning. On the other hand, the determination of whether the lands are properly included in a KGS is largely dependent upon factual interpretation, and when there is a material issue of fact determinative of the issues posed, this Board has the discretionary authority to order a hearing on the matter before an Admininstrative Law Judge pursuant to 43 CFR 4.415.

Harry Ptasynski, 107 IBLA 197 (Feb. 15, 1989)

Upon a determination that production has ceased on an oil and gas lease in its extended term by reason of such production because the well on the lease is no longer capable of production in paying quantities, the affected parties are entitled to notice and an opportunity to request a hearing on the issue of the productive capacity of the well where they have presented

HEARINGS--Continued

evidence raising an issue of fact regarding the status of the well.

Daymon D. Gililland, 108 IBLA 144 (Apr. 5, 1989)

The Director, MMS, held that the lessee violated 30 CFR 250.41(a)(2) because it knew or should have known that its actions could result in a blowout leading to the loss of gas. The lessee has responded claiming that, based upon information available to it during drilling, its actions were reasonable and prudent, and that the sole cause of the well loss was unforseeable. The record presents unresolved factual issues, and a hearing before an Administrative Law Judge is ordered.

Chevron U.S.A. Inc., et al., 110 IBLA 216 (Aug. 23, 1989)

HOMESTEADS (ORDINARY)

LANDS SUBJECT TO

BLM properly rejects an application for a homestead entry in a national forest because the Secretary of the Interior has no authority for such disposition.

Charles R. Walkemeyer, 108 IBLA 328 (May 1, 1989)

INDIAN PROBATE

ADMINISTRATIVE LAW JUDGE

Authority

An Administrative Law Judge does not have authority to limit or cut off appeal rights.

Estate of Paul Widow, 17 IBIA 107 (Apr. 3, 1989)

INDIAN PROBATE--Continued

ADOPTION (See also CHILDREN, ADOPTED--if included in this Index.)

Generally

Under Chapter 3, section 8, of the Blackfeet Tribal Law and Order Code of 1967, adoption decrees entered by a Montana State court in 1967 involving Blackfeet tribal members will be recognized by the Department of the Interior in determining the heirs of a deceased tribal member.

Estate of Joseph No Runner, 17 IBIA 124 (May 15, 1989)

APPEAL (See also PLEADING, RECONSIDERATION--if included in this Index.)

Matters Considered on Appeal

The Board of Indian Appeals is not required to consider arguments and evidence raised for the first time on appeal.

Estate of Lucy Buffalo Little Coyote, aka Thyra Redbird, 17 IBIA 31 (Jan. 10, 1989)

Estate of Alice Jackson (John), 17 IBIA 162 (July 5, 1989)

Timely Filing

An Administrative Law Judge does not have authority to limit or cut off appeal rights.

Estate of Paul Widow, 17 IBIA 107 (Apr. 3, 1989)

BUREAU OF INDIAN AFFAIRS

Generally

Failure of the Bureau of Indian Affairs to commence probate within 90 days of notice of an

INDIAN PROBATE--Continued

BUREAU OF INDIAN AFFAIRS--Continued

Generally--Continued

Indian's death, as required by 43 CFR 4.210(b), is not grounds to revoke approval of an Indian will.

Estate of Lucy Buffalo Little Coyote, aka Thyra Redbird, 17 IBIA 31 (Jan. 10, 1989)

HEARING (See also ADMINISTRATIVE PROCEDURE, REHEARING--if included in this Index.)

Full and Complete

Parties to an Indian probate proceeding are entitled to notice of the taking of a will scrivener's deposition and to the opportunity to cross-examine him/her, in accordance with 43 CFR 4.221(e) and the Administrative Procedure Act, 5 U.S.C. § 556(d) (1982).

Estate of Lucy Buffalo Little Coyote, aka Thyra Redbird, 17 IBIA 31 (Jan. 10, 1989)

The exclusion of irrelevant evidence from an Indian probate hearing is not a violation of the requirement for a full and complete hearing.

Estate of Alice Jackson (John), 17 IBIA 162 (July 5, 1989)

INDIAN TRIBES

Osage

The Department of the Interior can take appropriate action concerning the approval or disapproval of an Osage will after the entry of the Oklahoma district court's decision.

The Department of the Interior has authority to reopen an Osage probate upon a showing that the approval of a will was given under a mistake of fact.

Robert M. Maurer v. Muskogee Area Director, Bureau of Indian Affairs, 17 IBIA 129 (May 17, 1989)

INDIAN PROBATE--Continued

INHERITING (See also CHILDREN, ADOPTED; CHILDREN, ILLEGITMATE; WILLS--if included in this Index.)

Non-Indian

Because 25 U.S.C. § 181 (1982), applies only to tribal property, it does not prevent a non-Indian from receiving individually owned trust or restricted property either as an heir or devisee.

Estate of Ella Sarah Case Barnes, 17 IBIA 72 (Feb. 15, 1989)

LIFE ESTATES

Title to property subject to a life estate is in the remaindermen, not in the life tenant.

Estate of Ella Sarah Case Barnes, 17 IBIA 72 (Feb. 15, 1989)

REOPENING

Generally

Petitions to reopen Indian probates closed for more than 3 years require compelling proof that the petitioner has acted with due diligence.

In determining whether an Indian probate closed for more than 3 years should be reopened, the Board considers, inter alia, whether individuals with knowledge of the facts, or who might be expected to oppose the petition for reopening, have died before the filing of the petition.

Estate of Julius Benter (Bender), 17 IBIA 86 (Mar. 6, 1989)

An Administrative Law Judge has authority under 43 CFR 4.242(h) to reopen an Indian probate estate that has been closed for more than 3 years.

The omission of an heir or heirs is a manifest error within the meaning of 43 CFR 4.242(h) for which a closed Indian probate should be reopened, provided the

INDIAN PROBATE--Continued

REOPENING--Continued

Generally--Continued

other conditions of the regulation and the due diligence requirement have been met.

Estate of Paul Widow, 17 IBIA 107 (Apr. 3, 1989)

Standing to Petition for Reopening

An Agency Superintendent is a proper party to file a petition to reopen a closed Indian probate under 43 CFR 4.242(h).

Estate of Paul Widow, 17 IBIA 107 (Apr. 3, 1989)

TRUST PROPERTY

Under 25 CFR 162.2(a)(3), the Department is authorized to grant leases on individually owned land on behalf of the undetermined heirs of a decedent's estate. Until the completion of probate, including all appeals proceedings, the heirs of a decedent's estate have not been finally determined.

Estate of Ella Sarah Case Barnes, 17 IBIA 72 (Feb. 15, 1989)

WILLS (See also CONTRACT TO MAKE WILL, INHERITING--if included in this Index.)

Generally

Bureau of Indian Affairs instructions on the printed Indian will form and the form "Affidavit to Accompany Indian Will" are not Departmental regulations and are advisory only.

Estate of Lucy Buffalo Little Coyote, aka Thyra Redbird, 17 IBIA 31 (Jan. 10, 1989)

INDIAN PROBATE--Continued

WILLS (See also CONTRACT TO MAKE WILL, INHERITING--if included in this Index.)--Continued

Generally--Continued

Intent alone is not sufficient to create, alter, or revoke an Indian will.

Estate of Ella Sarah Case Barnes, 17 IBIA 72 (Feb. 15, 1989)

Disapproval of Will

Failure of the Bureau of Indian Affairs to commence probate within 90 days of notice of an Indian's death, as required by 43 CFR 4.210(b), is not grounds to revoke approval of an Indian will.

Estate of Lucy Buffalo Little Coyote, aka Thyra Redbird, 17 IBIA 31 (Jan. 10, 1989)

Publication

There is no requirement in 43 CFR 4.260 that an Indian testatrix publish her will by declaring to the witnesses that it is her last will and testament or that she be the person who requests the witnesses to sign.

Estate of Lena Abbie Big Bear Yellow Eagle, 17 IBIA 237 (Aug. 21, 1989)

Undue Influence

The burden of proof as to undue influence in Indian probate proceedings is on those contesting the will.

To invalidate an Indian will because of undue influence upon a testator, it must be shown: (1) That he was susceptible of being dominated by another; (2) that the person allegedly influencing him in the execution of the will was capable of controlling his mind and actions; (3) that such a person did exert influence upon the decedent of a nature calculated to induce or coerce him to make a will contrary to his own

INDIAN PROBATE--Continued

WILLS (See also CONTRACT TO MAKE WILL, INHERITING--if included in this Index.)--Continued

Undue Influence--Continued

desires; and (4) that the will is contrary to the decedent's own desires.

Estate of Alice Jackson (John), 17 IBIA 162 (July 5, 1989)

Witnesses, Attesting

The fact that an attesting witness is related to the testator does not invalidate the will.

Estate of Lucy Buffalo Little Coyote, aka Thyra Redbird, 17 IBIA 31 (Jan. 10, 1989)

WITNESSES

Cross-examination

Parties to an Indian probate proceeding are entitled to notice of the taking of a will scrivener's deposition and to the opportunity to cross-examine him/her, in accordance with 43 CFR 4.221(e) and the Administrative Procedure Act, 5 U.S.C. § 556(d) (1982).

Estate of Lucy Buffalo Little Coyote, aka Thyra Redbird, 17 IBIA 31 (Jan. 10, 1989)

INDIANS

GENERALLY

The Board of Indian Appeals will not consider issues which an appellant has not pursued on appeal.

W. Woodrow Metzger v. Acting Deputy Ass't Secretary--Indian Affairs (Operations), 17 IBIA 183 (July 12, 1989)

INDIANS--Continued

GENERALLY--Continued

A tribal member lacks standing to bring an administrative action for the tribe based on a personal assessment of what is or is not in the best interests of the tribe.

Elaine Frease & Bessey Villalobos v. Sacramento Area Director, Bureau of Indian Affairs, 17 IBIA 250 (Aug. 24, 1989)

ATTORNEYS

Contracts

Under 25 CFR 88.1(c), a decision of a Bureau of Indian Affairs Area Director approving, disapproving, or conditionally approving a tribal attorney contract is final for the Department and is not subject to appeal with the Department.

Ronald T. Welch et al. v. Area Director, Minneapolis Area Office, Bureau of Indian Affairs, 17 IBIA 56 (Jan. 30, 1989)

Fees

By regulation, the Department has interpreted the Equal Access to Justice Act to exclude all proceedings except those required by statute to be conducted under 5 U.S.C. § 554 (1982).

Utu Utu Gwaitu Paiute Tribe of the Benton Paiute Reservation v. Sacramento Area Director, Bureau of Indian Affairs, 17 IBIA 141 (June 19, 1989)

INDIANS--Continued

CONTRACTS

Formation and Validity

Bids and Awards

Generally

The appeal procedures in 25 CFR Part 2 do not apply to the protest of an award of a Federal procurement contract by a Bureau of Indian Affairs contracting officer, because procedures for such protests are set out in the Federal Acquisition Regulations, 48 CFR Parts 33.1 and 1433.1. The Board of Indian Appeals lacks jurisdiction over such protests.

United Sioux Tribes Development Corp. v. Aberdeen Area Director, Bureau of Indian Affairs, 17 IBIA 286 (Sept. 14, 1989)

EDUCATION AND TRAINING

Vocational Training

In order to receive adult vocational training through the Bureau of Indian Affairs, an applicant must be an adult Indian residing on or near the reservation.

Todd R. Kirkie v. Acting Aberdeen Area Director, Bureau of Indian Affairs, 17 IBIA 275 (Sept. 13, 1989)

FEDERAL RECOGNITION OF INDIAN TRIBES

Generally

Only Federally recognized Indian tribes qualify as tribal applicants for grants under Title II of the Indian Child Welfare Act, 25 U.S.C. §§ 1931-1934 (1982).

Aroostook Micmac Council, Inc. v. Eastern Area Director, Bureau of Indian Affairs, 17 IBIA 177 (July 11, 1989)

FINANCIAL MATTERS

Financial Assistance

Under 25 U.S.C. § 1463 (1982), the decision whether to approve a loan from the Indian Revolving Loan Fund is a decision requiring the exercise of discretion.

Angelita Aunko Hamilton v. Acting Anadarko Area Director, Bureau of Indian Affairs, 17 IBIA 152 (June 21, 1989)

To be eligible to receive a grant under the Indian Business Development Program, the applicant must not, in the opinion of the Secretary or his delegate, be able to obtain adequate financing from other sources.

Martha Billings, dba Galena Commercial Co. v. Acting Juneau Area Director, Bureau of Indian Affairs, 17 IBIA 158 (June 29, 1989)

INDIAN CHILD WELFARE ACT OF 1978

Financial Grant Applications

Generally

Only Federally recognized Indian tribes qualify as tribal applicants for grants under Title II of the Indian Child Welfare Act, 25 U.S.C. §§ 1931-1934 (1982).

A state-recognized Indian tribe may apply for a grant under Title II of the Indian Child Welfare Act, 25 U.S.C. §§ 1931-1934 (1982), if it qualifies as an off-reservation Indian organization.

In implementing a grant awarded under Title II of the Indian Child Welfare Act, 25 U.S.C. §§ 1931-1934 (1982), an off-reservation Indian organization may limit its service population to its own members.

Aroostook Micmac Council, Inc. v. Eastern Area Director, Bureau of Indian Affairs, 17 IBIA 177 (July 11, 1989)

INDIANS--Continued

INDIAN REORGANIZATION ACT

Neither the Indian Reorganization Act, 25 U.S.C. §§ 461-479 (1982), nor any other Federal law, contains a general requirement for approval of tribal ordinances by Federal officials. However, Indian tribes may, as a matter of tribal law, include an approval provision in their constitutions.

Fort McDermitt Paiute Shoshone Tribe v. Acting Phoenix Area Director, Bureau of Indian Affairs, 17 IBIA 144 (June 21, 1989)

JUDGMENT FUNDS

Where an Indian tribe's judgment fund distribution plan requires that the funds be expended only as approved by the tribal membership, the Bureau of Indian Affairs, as trustee for the funds, has the authority to decline to recognize the results of a tribal mail survey conducted for the purpose of approving expenditure of the funds, upon reasonably concluding that the results do not represent the informed views of the tribal membership.

While the Bureau of Indian Affairs should give deference to a tribe's interpretation of its own laws, its responsibility under Federal law for ensuring the proper performance of the tribe's judgment fund distribution plan requires it to make an independent judgment concerning whether the tribal membership has approved a proposal for expenditure of the funds.

Prairie Band of Potawatomi Indians v. Acting Area Director, Anadarko Area Office, Bureau of Indian Affairs, 17 IBIA 97 (Mar. 28, 1989)

LANDS

Generally

Monies deposited with the Bureau of Indian Affairs for lease rentals for a specified period of time during which lease applications were being considered and the lease applicant was using the properties are properly paid to the Indian tribal and/or individual landowners

INDIANS--Continued

LANDS--Continued

Generally--Continued

as rental for that period of time even though the lease negotiations ultimately fail.

W. Woodrow Metzger v. Acting Deputy Ass't Secretary--Indian Affairs (Operations), 17 IBIA 183 (July 12, 1989)

Allotments

Alienation

Approval of conveyances of Indian trust or restricted land is committed to the discretion of the Bureau of Indian Affairs. In reviewing such approvals, it is not the function of the Board of Indian Appeals to substitute its judgment for that of the Bureau. Rather, it is the Board's responsibility to ensure that proper consideration has been given to all legal prerequisites to the exercise of discretion.

Franklin Escalanti v. Acting Phoenix Area Director, Bureau of Indian Affairs, 17 IBIA 290 (Sept. 15, 1989)

Fair Rental Value

25 CFR 162.5(b)(2) vests the Secretary with discretion to approve the lease of tribal land to the Bureau of Indian Affairs, inter alia, at a nominal rental. In light of this regulatory provision, the decision whether the Bureau should pay fair market value to lease tribal land is committed to the Bureau's discretion. In reviewing such decisions, it is not the function of the Board of Indian Appeals to substitute its judgment for that of the Bureau. Rather, it is the Board's responsibility to ensure that proper consideration has been given to all legal prerequisites to the exercise of discretion.

San Carlos Apache Tribe v. Acting Phoenix Area Director, Bureau of Indian Affairs, 17 IBIA 299 (Sept. 21, 1989)

Rights-of-Way

The role of the Board of Indian Appeals in reviewing a Bureau of Indian Affairs determination of fair market value in connection with the taking of a road right-of-way over Indian land is to determine whether the decision is reasonable; that is, whether it is supported by law and substantial evidence.

When private property is taken by the United States, just compensation payable to the landowner is properly reduced by the value of benefits accruing to the landowner's remaining property as a result of the taking.

Utu Utu Gwaitu Paiute Tribe of the Benton Paiute Reservation v. Area Director, Sacramento Area Office, Bureau of Indian Affairs, 17 IBIA 78 (Feb. 22, 1989)

Trust Acquisitions

The decision whether to acquire land in trust status for an Indian tribe or individual is committed to the discretion of the Bureau of Indian Affairs. In reviewing such a decision, it is not the function of the Board of Indian Appeals to substitute its judgment for that of the Bureau. Rather, it is the Board's responsibility to ensure that proper consideration was given to all legal prerequisites to the exercise of discretion.

When the Bureau of Indian Affairs reviews a request to acquire land in trust status for an Indian tribe or individual, it is required to consider the factors listed in 25 CFR 151.10. Proof that each of these factors was considered must appear in the administrative record when the Bureau approves a trust acquisition.

City of Eagle Butte, South Dakota v. Aberdeen Area Director, Bureau of Indian Affairs, 17 IBIA 192 (July 25, 1989) 96 I.D. 328

Trust Acquisitions--Continued

The decision whether to acquire land in trust status for an Indian tribe or individual is committed to the discretion of the Bureau of Indian Affairs. In reviewing such a decision, it is not the function of the Board of Indian Appeals to substitute its judgment for that of the Bureau. Rather, it is the Board's responsibility to ensure that proper consideration was given to all legal prerequisites to the exercise of discretion.

Indian tribes and individuals have no legal right under 25 U.S.C. § 409a (1982), 25 U.S.C. § 465 (1982), or 25 U.S.C. § 501 (1982), to have land acquired in trust status for their benefit. Rather, under these statutory provisions, the determination whether to acquire the land is committed to the discretion of the Secretary of the Interior.

When the Bureau of Indian Affairs reviews a request to acquire land in trust status for an Indian tribe or individual, it is required to consider the factors listed in 25 CFR 151.10. Proof of the Bureau's consideration of the factors it relies upon to deny a trust acquisition application must appear in the administrative record.

Naomi Haikey Eades v. Muskogee Area Director, Bureau of Indian Affairs, 17 IBIA 198 (July 26, 1989)

The decision whether to acquire land in trust status for an Indian tribe or individual is committed to the discretion of the Bureau of Indian Affairs. In reviewing such a decision, it is not the function of the Board of Indian Appeals to substitute its judgment for that of the Bureau. Rather, it is the Board's responsibility to ensure that proper consideration was given to all legal prerequisites to the exercise of discretion.

When the Bureau of Indian Affairs reviews a request to acquire land in trust status for an Indian tribe or individual, it is required to consider the factors listed in 25 CFR 151.10. Proof that each of

INDIANS--Continued

LANDS--Continued

Trust Acquisitions--Continued

these factors was considered must appear in the administrative record when the Bureau approves a trust acquisition.

When the administrative record fails to show that the Bureau of Indian Affairs considered a factor or factors listed in 25 CFR 151.10 in approving a request to acquire land in trust status, the matter is appropriately remanded to the Bureau for such consideration.

Day County, South Dakota v. Aberdeen Area Director, Bureau of Indian Affairs, 17 IBIA 204 (July 26, 1989)

The decision whether to acquire land in trust status for an Indian tribe or individual is committed to the discretion of the Bureau of Indian Affairs. In reviewing such a decision, it is not the function of the Board of Indian Appeals to substitute its judgment for that of the Bureau. Rather, it is the Board's responsibility to ensure that proper consideration was given to all legal prerequisites to the exercise of discretion.

When the Bureau of Indian Affairs reviews a request to acquire land in trust status for an Indian tribe or individual, it is required to consider the factors listed in 25 CFR 151.10. Proof that these factors were considered appear in the administrative record.

Roberta C. Weckeah Bradley v. Anadarko Area Director, Bureau of Indian Affairs, 17 IBIA 210 (Aug. 2, 1989)

LEASES AND PERMITS

Generally

Under 25 CFR 162.2(a)(3), the Department is authorized to grant leases on individually owned land on behalf of the undetermined heirs of a decedent's estate. Until the completion of probate, including all

INDIANS--Continued

LEASES AND PERMITS--Continued

Generally--Continued

appeals proceedings, the heirs of a decedent's estate have not been finally determined.

Estate of Ella Sarah Case Barnes, 17 IBIA 72 (Feb. 15, 1989)

Monies deposited with the Bureau of Indian Affairs for lease rentals for a specified period of time during which lease applications were being considered and the lease applicant was using the properties are properly paid to the Indian tribal and/or individual landowners as rental for that period of time even though the lease negotiations ultimately fail.

W. Woodrow Metzger v. Acting Deputy Ass't Secretary--Indian Affairs (Operations), 17 IBIA 183 (July 12, 1989)

Under 25 U.S.C. § 415 (1982), any lease of Indian trust or restricted land that is not approved by the Secretary of the Interior or his authorized representative is void ab initio, has no force or effect, and grants no rights to either the attempted lessor or lessee.

Claire P. Smith v. Acting Billings Area Director, Bureau of Indian Affairs, 17 IBIA 231 (Aug. 18, 1989)

Cancellation or Revocation

A decision by the Bureau of Indian Affairs to revoke a contract made revocable by its express provisions will be upheld when the decision is in accordance with all requirements of the revocation clause.

Imperial County, California v. Acting Phoenix Area Director, Bureau of Indian Affairs, 17 IBIA 271 (Sept. 5, 1989)

LEASES AND PERMITS--Continued

Rental Rates

An agreement reducing the rental rate due on a lease of Indian trust property will be enforced.

Patricia A. Quisno v. Billings Area Director, Bureau of Indian Affairs, 17 IBIA 278 (Sept. 13, 1989)

25 CFR 162.5(b)(2) vests the Secretary with discretion to approve the lease of tribal land to the Bureau of Indian Affairs, inter alia, at a nominal rental. In light of this regulatory provision, the decision whether the Bureau should pay fair market value to lease tribal land is committed to the Bureau's discretion. In reviewing such decisions, it is not the function of the Board of Indian Appeals to substitute its judgment for that of the Bureau. Rather, it is the Board's responsibility to ensure that proper consideration has been given to all legal prerequisites to the exercise of discretion.

San Carlos Apache Tribe v. Acting Phoenix Area Director, Bureau of Indian Affairs, 17 IBIA 299 (Sept. 21, 1989)

OSAGE HEADRIGHTS

The Department of the Interior can take appropriate action concerning the approval or disapproval of an Osage will after the entry of the Oklahoma district court's decision.

The Department of the Interior has authority to reopen an Osage probate upon a showing that the approval of a will was given under a mistake of fact.

Robert M. Maurer v. Muskogee Area Director, Bureau of Indian Affairs, 17 IBIA 129 (May 17, 1989)

ROADS

The role of the Board of Indian Appeals in reviewing a Bureau of Indian Affairs determination of fair market value in connection with the taking of a road right-of-way over Indian land is to determine whether the decision is reasonable; that is, whether it is supported by law and substantial evidence.

When private property is taken by the United States, just compensation payable to the landowner is properly reduced by the value of benefits accruing to the landowner's remaining property as a result of the taking.

Utu Utu Gwaitu Paiute Tribe of the Benton Paiute Reservation v. Area Director, Sacramento Area Office, Bureau of Indian Affairs, 17 IBIA 78 (Feb. 22, 1989)

TIMBER RESOURCES

Generally

A Bureau of Indian Affairs appraisal of tribal timber resources conducted for the purpose of evaluating proposed stumpage rates will not be overturned unless it is shown to be unreasonable.

White Mountain Apache Tribe dba Fort Apache Timber Co. v. Deputy Ass't Secretary--Indian Affairs (Operations), 17 IBIA 258 (Aug. 25, 1989)

Timber Sales Contracts

Generally

The determination whether to approve stumpage rates under a timber sale contract between a tribe and its tribal forest enterprise is committed to the discretion of the Bureau of Indian Affairs. In reviewing such a decision, it is not the function of the Board of Indian Appeals to substitute its judgment for that of the Bureau. Rather, it is the Board's responsibility to ensure that proper consideration was given to all legal prerequisites to the exercise of discretion.

There is no conflict between the Federal policy favoring tribal self-determination and the Federal trust responsibility for tribal timber resources where

INDIANS--Continued

TIMBER RESOURCES--Continued

Timber Sales Contracts--Continued

Generally--Continued

both tribal law and Federal regulations require that stumpage rates for tribal timber be approved by the Bureau of Indian Affairs.

25 CFR 163.6(c) requires that stumpage rates for tribal timber sold to Indian tribal forest enterprises be authorized by the Secretary of the Interior.

White Mountain Apache Tribe dba Fort Apache Timber Co. v. Deputy Ass't Secretary--Indian Affairs (Operations), 17 IBIA 258 (Aug. 25, 1989)

TRIBAL GOVERNMENT

Generally

In furthering the doctrines of tribal sovereignty and self-determination, the Department of the Interior has recognized the right of Indian tribes to resolve their own internal disputes.

Ellen Wright v. Aberdeen Area Director, Bureau of Indian Affairs, 17 IBIA 296 (Sept. 21, 1989)

Constitutions, Bylaws, and Ordinances

In furthering the doctrines of Indian sovereignty and self-determination, the Department of the Interior has recognized the right of Indian tribes initially to interpret their own governing documents and to resolve their own internal disputes, and, in administering the government-to-government relationship with a tribe, has given deference to that tribe's reasonable interpretation of its own laws.

Anna Thompson et al. v. Area Director, Eastern Area Office, Bureau of Indian Affairs, 17 IBIA 39 (Jan. 23, 1989)

INDIANS--Continued

TRIBAL GOVERNMENT--Continued

Constitutions, Bylaws, and Ordinances--Continued

The Board of Indian Appeals undertakes to interpret tribal law only where there is a clear necessity for it to do so.

Herschel Sahmaunt et al. v. Area Director, Anadarko Area Office, Bureau of Indian Affairs, 17 IBIA 60 (Jan. 30, 1989)

While the Bureau of Indian Affairs should give deference to a tribe's interpretation of its own laws, its responsibility under Federal law for ensuring the proper performance of the tribe's judgment fund distribution plan requires it to make an independent judgment concerning whether the tribal membership has approved a proposal for expenditure of the funds.

Prairie Band of Potawatomi Indians v. Acting Area Director, Anadarko Area Office, Bureau of Indian Affairs, 17 IBIA 97 (Mar. 28, 1989)

The Department of the Interior has authority to interpret a tribal constitution with respect to the Secretary's ordinance approval role under the constitution.

Neither the Indian Reorganization Act, 25 U.S.C. §§ 461-479 (1982), nor any other Federal law, contains a general requirement for approval of tribal ordinances by Federal officials. However, Indian tribes may, as a matter of tribal law, include an approval provision in their constitutions.

The Secretary of the Interior may delegate to subordinate officials the authority to approve tribal ordinances granted to him in tribal constitutions.

Fort McDermitt Paiute Shoshone Tribe v. Acting Phoenix Area Director, Bureau of Indian Affairs, 17 IBIA 144 (June 21, 1989)

TRIBAL GOVERNMENT--Continued

Constitutions, Bylaws, and Ordinances--Continued

In furthering the doctrines of Indian sovereignty and self-determination, the Department of the Interior has recognized the right of Indian tribes initially to interpret their own governing documents and to resolve their own internal disputes, and, in administering the government-to-government relationship with a tribe, has given deference to that tribe's reasonable interpretation of its own laws.

Under Article IV of its constitution, the Minnesota Chippewa Tribe has authority to establish a tribal appellate forum to supervise the actions of an Election Judge in order to determine whether the Judge has acted within the scope of the authority delegated under the tribal election ordinance.

Walter F. Reese, Anishinabe Akeeng, Inc., & the Enrolled Members for Constitutional Rights v. Minneapolis Area Director, Bureau of Indian Affairs, 17 IBIA 169 (July 6, 1989)

While the Bureau of Indian Affairs should give deference to a tribe's interpretation of its own laws, its responsibilities under Federal and tribal law may require it to make an independent determination concerning whether certain tribal actions were taken in accordance with tribal law.

Under Article IV, sec. 1, of the Constitution of the Rumsey Indian Rancheria, the governing body of the tribe is the Community Council, which is "composed of all qualified voters of the band who are 18 years of age or older."

Elaine Frease & Bessey Villalobos v. Sacramento Area Director, Bureau of Indian Affairs, 17 IBIA 241 (Aug. 24, 1989)

INDIANS--Continued

TRIBAL GOVERNMENT--Continued

Elections

Where an Indian tribe's judgment fund distribution plan requires that the funds be expended only as approved by the tribal membership, the Bureau of Indian Affairs, as trustee for the funds, has the authority to decline to recognize the results of a tribal mail survey conducted for the purpose of approving expenditure of the funds, upon reasonably concluding that the results do not represent the informed views of the tribal membership.

Prairie Band of Potawatomi Indians v. Acting Area Director, Anadarko Area Office, Bureau of Indian Affairs, 17 IBIA 97 (Mar. 28, 1989)

TRIBAL POWERS

Generally

The Board of Indian Appeals has jurisdiction over decisions issued by Bureau of Indian Affairs officials under 25 CFR Chapter I. It does not have jurisdiction over decisions made by duly constituted tribal officials or governing bodies.

Anna Thompson et al. v. Area Director, Eastern Area Office, Bureau of Indian Affairs, 17 IBIA 39 (Jan. 23, 1989)

Self-Determination

There is no conflict between the Federal policy favoring tribal self-determination and the Federal trust responsibility for tribal timber resources where both tribal law and Federal regulations require that stumpage rates for tribal timber be approved by the Bureau of Indian Affairs.

White Mountain Apache Tribe dba Fort Apache Timber Co. v. Deputy Ass't Secretary--Indian Affairs (Operations), 17 IBIA 258 (Aug. 25, 1989)

INDIANS--Continued

TRIBAL POWERS--Continued

Tribal Sovereignty

One of the most fundamental concepts of Indian law is that Indian tribes are dependent sovereign nations that retain full powers of internal self-government except to the extent that those powers have been limited by treaty or express Federal congressional action. The corollary of this proposition is that, acting alone, states lack the power to limit the sovereignty of an Indian tribe.

In furthering the doctrines of Indian sovereignty and self-determination, the Department of the Interior has recognized the right of Indian tribes initially to interpret their own governing documents and to resolve their own internal disputes, and, in administering the government-to-government relationship with a tribe, has given deference to that tribe's reasonable interpretation of its own laws.

Anna Thompson et al. v. Area Director, Eastern Area Office, Bureau of Indian Affairs, 17 IBIA 39 (Jan. 23, 1989)

In furthering the doctrines of Indian sovereignty and self-determination, the Department of the Interior has recognized the right of Indian tribes initially to interpret their own governing documents and to resolve their own internal disputes, and, in administering the government-to-government relationship with a tribe, has given deference to that tribe's reasonable interpretation of its own laws.

Walter F. Reese, Anishinabe Akeeng, Inc., & the Enrolled Members for Constitutional Rights v. Minneapolis Area Director, Bureau of Indian Affairs, 17 IBIA 169 (July 6, 1989)

TRUST RESPONSIBILITY

There is no conflict between the Federal policy favoring tribal self-determination and the Federal trust responsibility for tribal timber resources where both tribal law and Federal regulations require that

INDIANS--Continued

TRUST RESPONSIBILITY--Continued

stumpage rates for tribal timber be approved by the Bureau of Indian Affairs.

White Mountain Apache Tribe dba Fort Apache Timber Co. v. Deputy Ass't Secretary--Indian Affairs (Operations), 17 IBIA 258 (Aug. 25, 1989)

WATER AND POWER RESOURCES

Irrigation Projects

The setting of an operation and maintenance rate for an Indian irrigation project, pursuant to 25 U.S.C. § 385 (1982), is rulemaking within the meaning of 5 U.S.C. § 551(4) and (5) (1982).

Joint Board of Control for the Flathead, Mission, & Jocko Irrigation Districts v. Area Director, Portland Area Office, Bureau of Indian Affairs, 17 IBIA 65 (Feb. 15, 1989)

Operation and Maintenance

The setting of an operation and maintenance rate for an Indian irrigation project, pursuant to 25 U.S.C. § 385 (1982), is rulemaking within the meaning of 5 U.S.C. § 551(4) and (5) (1982).

Joint Board of Control for the Flathead, Mission, & Jocko Irrigation Districts v. Area Director, Portland Area Office, Bureau of Indian Affairs, 17 IBIA 65 (Feb. 15, 1989)

LACHES

The acceptance of a mining claim filing for recordation does not preclude BLM from subsequently declaring the claim to be null and void ab initio upon a finding that the land on which the claim was located was withdrawn from the location of mining claims at the time the claim was located.

Robert L. Payne et al., 107 IBLA 71 (Jan. 30, 1989)

LACHES--Continued

The authority of the United States to enforce a public right or protect a public interest is not vitiated or lost by laches, neglict of duty, failure to act, or delays in the performance of duties.

Mallon Oil Co., 107 IBLA 150 (Feb. 10, 1989)

MILLSITES

GENERALLY

The failure to file an annual notice of intention to hold a millsite claim is a curable defect, and BLM may not declare a millsite abandoned and void without first according the claimant an opportunity to comply with the notice of deficiency. Where, owing to misdelivery of BLM's decision providing such opportunity and BLM's misstatement of applicable appeal procedures, claimant may not have been aware of such opportunity, the claimant may be provided with an additional opportunity on remand.

Jean Emanuel Hatton, Eva M. Pool, Phillip Emanuel, 107 IBLA 47 (Jan. 27, 1989)

The Department has long followed the rule that transmission of a document to a party's last address of record by registered or certified mail, return receipt requested, constitutes constructive service even though delivery was unsuccessful. However, a party may defeat application of the rule by showing error in Postal Service procedure amounting to negligence in transmitting the decision.

David Robertson, 107 IBLA 114 (Feb. 2, 1989)

MINERAL LANDS

GENERALLY

A necessary element in any determination respecting the validity of a mining claim is the availability of the land for mining location. Until it has been determined that land is subject to mining location, any decision relating to the mineral character of land embraced in a mining claim or the sufficiency of a purported discovery is premature insofar as the validity of the claim is concerned.

E. J. Belding, Jr., Melinda S. Belding, 109 IBLA 198 (June 12, 1989) 96 I.D. 272

MINERAL RESERVATION

Where land has been conveyed to the United States reserving to the grantors the exclusive right to prospect for and exploit the oil and gas underlying the land and that reservation has been extended beyond its initial term by production, in accordance with the terms of the deed, the United States has, during the extended term, no interest in any of that oil and gas sufficient to form the basis for claiming compensatory royalty because of drainage.

Doris Slaaten, 107 IBLA 16 (Jan. 25, 1989)

This Board will affirm a BLM decision consenting to directional drilling of an oil and gas well spudded on state lands, drilled through lands described in a Federal lease, and bottomed on private lands when there is a showing that the consent is conditioned upon taking steps to prevent unnecessary or unreasonable interference with the right of the Federal lessee.

M. J. Harvey, Jr., 109 IBLA 31 (May 25, 1989)

PROSPECTING PERMITS

The filing of a bentonite prospecting permit application creates no vested rights in the applicant.

MINERAL LANDS--Continued

PROSPECTING PERMITS--Continued

If the land described in the application is determined to be within a known bentonite leasing area, it is subject to the competitive leasing provisions of 30 CFR Subpart 3564, and the application must be rejected. Rejection is required even if the application was filed prior to the ascertainment of the extent or workability of the underlying bentonite bed.

A. J. Maurer, Jr., 106 IBLA 308 (Jan. 6, 1989)

MINERAL LEASING ACT

GENERALLY

Oil and gas offers to lease were properly rejected by BLM pursuant to 1976 Federal Coal Leasing Amendments Act amendments to the Mineral Leasing Act, 30 U.S.C. § 201(a)(2)(A) (1982), requiring that a lessee who has held a Federal coal lease for a period of 10 years must be producing coal in commercial quantities in order to qualify for other Federal leases under the Mineral Leasing Act, where oil and gas offers to lease were made, and offeror could not show that production was occurring in commercial quantities from a readjusted coal lease held by offeror for a period of more than 10 years.

Where offeror who has held a coal lease in excess of 10 years seeks to qualify for exemption from Federal Coal Leasing Amendments Act amendments to the Mineral Leasing Act requiring production from offeror's coal lease in commercial quantities, and claims that its lease is under application for a logical mining unit, offeror must show that its logical mining unit application was pending at the time the oil and gas offer to lease was rejected.

Under 1976 Federal Coal Leasing Amendments Act amendments to the Mineral Leasing Act requiring coal lessees who have held leases for a period of 10 years to produce coal in commercial quantities in order to qualify for other Federal leases, where coal lessee offers to bid on other Federal leases pursuant to the Mineral Leasing Act, terms and conditions of offeror's coal lease or leases are subject to the qualifying provision of 30 U.S.C. § 201(a)(2)(A) (1982), insofar as

MINERAL LEASING ACT--Continued

GENERALLY--Continued

the lessee seeks to qualify to hold other Federal leases.

GeoResources, Inc., 107 IBLA 311 (Mar. 2, 1989)
96 I.D. 77

Under 43 CFR 3453.3-1(a) and 3472.1-2(e)(1), where parties have held a Federal coal lease for 10 years from which they were not producing the coal deposits in commercial quantities, in the absence of extraordinary circumstances concerning the failure to produce coal on this lease, BLM is prohibited from approving an assignment transferring an interest in any existing Federal coal lease to them. Under 43 CFR 3472.1-2(e)(1)(ii), an entity seeking to obtain approval of a transfer must qualify on the date the transfer is disapproved. Where the parties did not qualify for the assignment at the time BLM considered their application for approval of assignment, BLM properly disapproves the application.

The requirement that a coal lease be "diligently developed" on pain of termination is not equivalent to the restriction imposed by 43 CFR 3472.1-2(e)(1)(i) on transfer of lease interests to lessees with other Federal coal leases that they have held in excess of 10 years without producing the coal deposits "in commercial quantities." It is irrelevant to the application of 43 CFR 3472.1-2(e)(1)(i) when and whether the holders of a lease not producing coal deposits in commercial quantities might also be required to accomplish "diligent development" of that lease.

The Board of Land Appeals has no authority to declare invalid duly promulgated regulations of the Department; such regulations have the force and effect of law and are binding on the Department. Sec. 3472.1-2(e) of 43 CFR was "duly promulgated" and, accordingly, has binding force and effect of law. Further, this provision is amply authorized by relevant provisions of the Mineral Leasing Act.

The intent of the proviso in a Federal coal lease that it is "pursuant and subject to the terms and provisions of the [Mineral Leasing Act], and to all reasonable regulations of the Secretary of the Interior, now or hereafter in force which are made a part hereof" is to incorporate future regulations, even though inconsistent with those in effect at the

MINERAL LEASING ACT--Continued

GENERALLY--Continued

time of execution of the lease under the Mineral Leasing Act, and even though to do so creates additional obligations or burdens for the lessee. The implementation of the burden imposed by 43 CFR 3472.1-2(e)(1)(i) is consistent with the enforcement of the congressionally imposed obligation to develop Federal coal leases.

Veola & Aaron Rasmussen, 109 IBLA 106 (June 7, 1989)

BLM properly increases the bond for a coal lease in accordance with appropriate Departmental guidelines where the lease goes from a nonproducing to a producing status, regardless of whether such production constitutes full development of the leased land.

United States Fuel Co., 109 IBLA 398 (June 27, 1989)

The Board of Land Appeals has no authority to declare invalid duly promulgated regulations of this Department. Such regulations have the force and effect of law and are binding on the Department.

If the record contains conflicting BLM calculations of recoverable coal reserves existing on the lease at the time the lease became subject to the due diligence requirement, and BLM has failed to explain its decision to use an earlier, higher estimate of recoverable reserves rather than a subsequent, lower estimate for calculating the production rate necessary to satisfy the continued operation requirement, BLM's calculations will be set aside, and the case will be remanded for further consideration of the recoverable coal reserves estimate.

Coastal States Energy Co., 110 IBLA 179 (Aug. 15, 1989)

MINERAL LEASING ACT--Continued

GENERALLY--Continued

Promulgation of 43 CFR 3550 (1986) pursuant to sec. 21 of the Mineral Leasing Act, as amended by the Combined Hydrocarbon Leasing Act of 1981, 30 U.S.C. § 241 (1982), establishing a dual competitive/noncompetitive leasing system for gilsonite, was within the Secretary's discretion pursuant to sec. 21 of the Act, is reasonably adopted to the administration of the Act, is not inconsistent with it, and has the force and effect of law.

Where BLM prepares a Technical Mineral Report for purposes of evaluation, based upon geologic considerations, of the extent of known gilsonite deposits, the Secretary is entitled to rely upon the expertise of his technical experts, and absent showing of error by a preponderance of the evidence, a mere difference of opinion with the expert will not suffice to reverse the reasoned opinions of the Secretary's technical staff.

Where appellant attempted to show error in a Technical Mineral Report prepared by BLM by alleging inconsistency in the report, by allenging that as a basis for its report, BLM used criteria applicable to the coal mining industry and not appropriate to the gilsonite industry, and by arguing that BLM's choices of parameters for competitive leasing are not based in fact; and where appellant submitted no proof other than an affidavit by its president, which did not indicate any basis in geologic analysis, appellant did not establish error in the Bureau's report by a preponderance of the evidence, and the Secretary was entitled to rely upon the reasoned opinions of his technical expert.

American Gilsonite, 111 IBLA 1 (Sept. 19, 1989)
96 I.D. 408

GILSONITE LEASES AND PERMITS

Generally

Promulgation of 43 CFR 3550 (1986) pursuant to sec. 21 of the Mineral Leasing Act, as amended by the Combined Hydrocarbon Leasing Act of 1981, 30 U.S.C. § 241 (1982), establishing a dual competitive/noncompetitive leasing system for gilsonite, was within the Secretary's discretion pursuant to sec. 21 of the Act, is reasonably adopted to the administration of the Act,

MINERAL LEASING ACT--Continued

GILSONITE LEASES AND PERMITS--Continued

Generally--Continued

is not inconsistent with it, and has the force and effect of law.

Where BLM prepares a Technical Mineral Report for purposes of evaluation, based upon geologic considerations, of the extent of known gilsonite deposits, the Secretary is entitled to rely upon the expertise of his technical experts, and absent showing of error by a preponderance of the evidence, a mere difference of opinion with the expert will not suffice to reverse the reasoned opinions of the Secretary's technical staff.

Where appellant attempted to show error in a Technical Mineral Report prepared by BLM by alleging inconsistency in the report, by allenging that as a basis for its report, BLM used criteria applicable to the coal mining industry and not appropriate to the gilsonite industry, and by arguing that BLM's choices of parameters for competitive leasing are not based in fact; and where appellant submitted no proof other than an affidavit by its president, which did not indicate any basis in geologic analysis, appellant did not establish error in the Bureau's report by a preponderance of the evidence, and the Secretary was entitled to rely upon the reasoned opinions of his technical expert.

American Gilsonite, 111 IBLA 1 (Sept. 19, 1989)
96 I.D. 408

Applications

Where applications for prospecting permits filed prior to the effective date of authorizing regulations are not rejected by BLM, they may be cured by amendment, with priority established on the date amendments are filed. For the purpose of establishing priority, the amended applications are treated in the same manner as over-the-counter lease offers. If the filing of intervening applications prevents a determination of priority, the ambiguity should be remedied by simultaneous drawing.

American Gilsonite, 111 IBLA 1 (Sept. 19, 1989)
96 I.D. 408

MINERAL LEASING ACT--Continued

GILSONITE LEASES AND PERMITS--Continued

Workability

"Workability." Although the definition of "workability" concerns the extent of known deposits, the test of workability is dependent upon intrinsic economic factors, which take into account whether the value of extraction of the mineral is greater than the cost of its extraction.

Workability may be established by geologic inference where detailed information is available regarding the existence of a workable deposit in adjacent lands and there are geologic and other surrounding conditions from which the workability of the deposit can be reasonably inferred. The fact that lands applied for adjoin other lands which contain known workable gilsonite deposits does not, alone, establish a geologic inference that the lands under application contain known workable deposits as well.

In determining whether lands are of such character as to subject them to leasing rather than prospecting under permits, absent a showing of error by a preponderance of the evidence, the Secretary is entitled to rely upon the reasoned opinion of his technical experts. A mere difference of opinion will not establish such error.

American Gilsonite, 111 IBLA 1 (Sept. 19, 1989)
96 I.D. 408

LANDS SUBJECT TO

A decision to cancel an oil and gas lease on the basis of circumstances existing at the time of lease issuance will be reversed in the absence of a showing that the lease was issued without legal authority under relevant statute or regulation regardless of the existence of grounds which would have been sufficient to support an exercise of the Department's discretionary authority to reject a lease offer for the lands.

Joan Chorney, 108 IBLA 43 (Mar. 21, 1989)

LANDS SUBJECT TO--Continued

A decision to cancel an oil and gas lease will be affirmed on appeal to the extent it is shown that the lease was issued through administrative error for lands within a wilderness study area which the Department was barred by statute from leasing for oil and gas. The statutory protection afforded a bona fide purchaser of a lease under 30 U.S.C. § 184(h)(2) (1982), does not bar cancellation of a lease erroneously issued for lands which the Department was prohibited from leasing by act of Congress.

Joan Chorney (On Reconsideration), 109 IBLA 96 (June 5, 1989)

RENTALS

A BLM appraisal of a right-of-way for a compressor station will be affirmed on appeal where the right-of-way holder has not demonstrated that it was error for BLM to use a market survey of comparable transactions involving the issuance of private rights-of-way rather than the fee schedule for linear rights-of-way or the "before and after" appraisal method.

Colorado Interstate Gas Co., 110 IBLA 171 (Aug. 14, 1989)

ROYALTIES

Where MMS imposes late payment charges in accordance with 30 CFR 218.200(a) (1986), a coal lessee may not invoke the estimated payment exception in that regulation when there is no evidence that the lessee sought prior authorization from MMS to make estimated payments.

Estoppel will not lie against the Government to preclude collection of late payment charges where a coal lessee allegedly makes royalty payments based on the erroneous advice of a Government employee concerning the royalty rate, but the record shows that the lessee was not ignorant of the true facts concerning the effective date of a new royalty rate.

Utah International, Inc., 107 IBLA 217 (Feb. 21, 1989)

ROYALTIES--Continued

Under 30 U.S.C. § 226(b)(1) (1982), royalty is properly assessed on the amount of crude oil used to generate electricity in a cogeneration facility, where that electricity is the subject of a sale to a third party, even if the same electricity is subsequently repurchased and used for beneficial purposes on the lease.

Where royalty is due on crude oil which is utilized to produce electricity, the proper method of valuation for purposes of determining the amount of royalty due is the value of the crude oil had it been sold.

Petro-Lewis Corp., 108 IBLA 20 (Mar. 20, 1989)
96 I.D. 127

Sec. 6 of the Federal Coal Leasing Amendments Act of 1976, 30 U.S.C. § 207(b) (1982), requires continued operation of a lease that has achieved diligent development. However, the requirement may be suspended upon application and payment of advance royalties. The failure to make advance royalty payments in lieu of continued operation subjects the lease to cancellation.

Coastal States Energy Co., 110 IBLA 179 (Aug. 15, 1989)

MINERALS EXPLORATION

This Board will affirm a BLM decision consenting to directional drilling of an oil and gas well spudded on state lands, drilled through lands described in a Federal lease, and bottomed on private lands when there is a showing that the consent is conditioned upon taking steps to prevent unnecessary or unreasonable interference with the right of the Federal lessee.

M. J. Harvey, Jr., 109 IBLA 31 (May 25, 1989)

MINERAL MANAGEMENT SERVICE

GENERALLY

Under 30 U.S.C. § 226(b)(1) (1982), royalty is properly assessed on the amount of crude oil used to generate electricity in a cogeneration facility, where that electricity is the subject of a sale to a third party, even if the same electricity is subsequently repurchased and used for beneficial purposes on the lease.

Where royalty is due on crude oil which is utilized to produce electricity, the proper method of valuation for purposes of determining the amount of royalty due is the value of the crude oil had it been sold.

Petro-Lewis Corp., 108 IBLA 20 (Mar. 20, 1989)
96 I.D. 127

MINING CLAIMS

GENERALLY

Nothing in either the Wild and Scenic Rivers Act, 16 U.S.C. §§ 1271-1287 (1982), nor the Act of Oct. 12, 1976, 90 Stat. 2327, which designated the Upper Missouri Wild and Scenic River as a component of the wild and scenic river system, automatically withdrew all land within the management boundaries of the Upper Missouri Wild and Scenic River, but beyond the one-quarter mile statutory withdrawal, from the operation of the mining laws.

John R. Lynn, Joe Trow, 106 IBLA 317 (Jan. 6, 1989)

A corporation organized under the laws of the United States or of any state or territory thereof may occupy and purchase mining claims from the Government, irrespective of the ownership of stock therein by persons, corporations, or associations not citizens of the United States.

Melvin Helit, A-Able Plumbing, Inc., 110 IBLA 144 (Aug. 10, 1989)

MINING CLAIMS--Continued

ABANDONMENT

Under 43 U.S.C. § 1744 (1982), the owner of an unpatented mining claim must file evidence of annual assessment work or a notice of intention to hold the claim prior to Dec. 31 of each year. Such filings must be made within each calendar year, i.e., on or after Jan. 1 and on or before Dec. 30. Failure to file within the calendar year properly results in the claim being deemed abandoned and void. Congress assigned the owner of the mining claim the responsibility of making the filings required by 43 U.S.C. § 1744 (1982), and the owner must bear the consequence of filings not timely made. The pendency of contest or condemnation proceedings does not excuse a claim owner from the statutory filing requirements. BLM has no affirmative obligation to send a mining claim owner a reminder notice concerning the need to make annual filings required by 43 U.S.C. § 1744 (1982).

Jean Emanuel Hatton, Eva M. Pool, Phillip Emanuel, 107 IBLA 47 (Jan. 27, 1989)

Unless a final certificate has been issued, an applicant for a patent to mining claim is not excused under 43 CFR 3833.2-4 from the requirement to file annually an affidavit of assessment work or notice of intention to hold the claim with BLM under 43 U.S.C. § 1744 (1982).

The purchase price for lands covered by an application for mineral patent is not properly submitted until after it is established that no adverse claim or other objection appears. Where the record establishes that there were significant problems with a patent application requiring resolution before purchase money could properly be tendered and final certificate issued, the premature payment and acceptance of mineral patent purchase price neither creates any right to receive certificate of title nor lifts the obligation to comply with the recordation provisions of the Federal Land Policy and Management Act of 1976.

BLM properly rejects a patent application for mining claims which have become invalid because the claimant failed to file a copy of his affidavit of assessment work as required by 43 U.S.C. § 1744 (1982).

U. A. Small, 108 IBLA 102 (Mar. 29, 1989)

ABANDONMENT--Continued

The owner of an unpatented mining claim located on public land is required by 43 U.S.C. § 1744 (1982), and 43 CFR 3833.2 to file evidence of assessment work performed or a notice of intention to hold with the proper BLM office on or before Dec. 30 of each calendar year. By regulation 43 CFR 3833.0-5(m), the Department considers such documents to be timely filed if placed in an envelope postmarked by the U.S. Postal Service on or before Dec. 30 and received in the proper BLM office on or before the following Jan. 19. Where the record shows compliance with that regulation, a BLM decision declaring a claim abandoned and void based on an untimely filing must be reversed.

By regulation 43 CFR 3833.0-5(m), the Department considers affidavits of annual assessment work or notices of intention to hold to be timely filed if placed in an envelope postmarked by the U.S. Postal Service on or before Dec. 30 and received in the proper BLM office on or before the following Jan. 19. Where the record shows that a mining claimant utilized the U.S. Postal Service to deliver his affidavit of assessment work and that it was received by the proper BLM office on Jan. 6, 1986, but the record does not contain the envelope in which the affidavit was sent, the mining claimant will not be required to bear the consequences of BLM's failure to retain the envelope, and a decision declaring the claim abandoned and void will be reversed.

Gary Hennis, 108 IBLA 121 (Mar. 30, 1989)

The conclusive presumption of abandonment for failure to comply with the recordation requirements of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744(a) (1982), is self-operative and does not depend upon any act or decision of an administrative official. Where a claim is omitted from the express listing of a group of claims for which annual assessment work was performed but was depicted on a map accompanying the affidavit of assessment work, it is wholly a matter of conjecture whether the claim not specifically identified was intended to be listed as the object of assessment work expenditures.

Douglas C. Liechty, 108 IBLA 247 (Apr. 24, 1989)

MINING CLAIMS--Continued

ABANDONMENT--Continued

Failure to file in the proper Bureau of Land Management office either evidence of assessment work performed or notice of intention to hold as required by 43 U.S.C. § 1744 (1982), and 43 CFR 3833.2 within the time period prescribed results in a conclusive presumption of abandonment of the mining claim.

Donald G. Sterner, 109 IBLA 76 (May 30, 1989)

Daniel D. Draper, 109 IBLA 85 (May 31, 1989)

Under 43 CFR 3833.0-5(m), "timely filed" means being filed within the time period prescribed by law, or received by Jan. 19, after the period prescribed by law in an envelope bearing a clearly dated postmark affixed by the United States Postal Service within the period prescribed by law. A proof of labor for a mining claim is timely filed when it was received by January 19, at the Nevada State Office and was in an envelope bearing a clearly dated postmark dated Dec. 26, which is within the period prescribed by law, and BLM's decision declaring the claim abandoned and void is properly reversed.

Patrick J. McClain, 109 IBLA 320 (June 21, 1989)

Failure to file in the proper Bureau of Land Management office either evidence of assessment work performed or notice of intention to hold as required by 43 U.S.C. § 1744 (1982), and 43 CFR 3833.2 within the time period prescribed results in a conclusive presumption of abandonment of the mining claim. Only where a patent application has been filed and a final certificate has been issued will a mining claimant be excused under 43 CFR 3833.2-4 from complying with the filing requirement.

B. J. Londo et al., 109 IBLA 353 (June 23, 1989)

MINING CLAIMS--Continued

ABANDONMENT--Continued

Failure to file in the proper Bureau of Land Management office either evidence of work performed or notice of intention to hold as required by 43 U.S.C. § 1744 (1982), and 43 CFR 3833.2 within the time period prescribed results in a conclusive presumption of abandonment of the mining claim. Under 43 CFR 3833.0-5(m), a document which is mailed will be considered timely filed provided it bears a clearly dated postmark affixed by the U.S. Postal Service on or before the filing deadline. Where an envelope received by BLM after the Dec. 30 end of the filing period does not bear a postmark date falling within the filing period, the regulation will not apply and the filing is therefore untimely.

Chemical Products Corp., 109 IBLA 357 (June 23, 1989)

Jurisdiction over disputes between rival mining claimants is reserved to the courts, and it is not for the Department to decide whether one claimant has a better right to a claim because the rival claimant has allegedly failed to file the document required under sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1976).

Rufus B. McIlroy, 111 IBLA 144 (Sept. 29, 1989)

ASSESSMENT WORK

Evidence that a mining claimant possesses a return receipt card or certified mail receipt indicating there was a timely filing of a document with BLM serves to rebut the presumption of nonfiling which is customarily applied where BLM's records indicate a required filing has not occurred, absent a showing by BLM that the claimant filed any other document on that date. Although the nature of the document received by BLM is not described on the receipt or card, the existence of this proof indicates it is more probable than not that the required document was received by BLM.

Sydney Green, 109 IBLA 19 (May 24, 1989)

MINING CLAIMS--Continued

ASSESSMENT WORK--Continued

Substantial compliance with the 1872 Mining Law, in the form of good faith acts of discovery and performance of assessment work, cannot confer vested rights, or valid existing rights, where Congress has withdrawn lands from location prior to the good faith acts of the locator.

E. J. Belding, Jr., Melinda S. Belding, 109 IBLA 198 (June 12, 1989) 96 I.D. 272

CONTESTS

When the Government contests mining claims on a charge of lack of discovery of a valuable mineral deposit, it has the burden of going forward with sufficient evidence to establish a prima facie case as to that charge; however, the mining claimant has the ultimate burden of refuting the Government's case by a preponderance of the evidence.

United States v. Charles M. Crawford, dba Casi Mining & Mineral Exploration Co., 109 IBLA 264 (June 16, 1989)

When a rival mining claimant files an adverse claim against a mineral patent application, the adverse claimant is required to commence proceedings in a court of competent jurisdiction within 30 days after filing his claim, and failure so to do shall be a waiver of his adverse claims.

The failure to file a timely appeal from a decision by an Administrative Law Judge in a private contest declaring mining claims invalid precludes the Board from considering the contestee's appeal from the denial of a later protest to the extent that the appeal involves issues resolved in the contest decision.

Where an application for mineral patent of lode claims is filed and no adverse claim is asserted as required by 30 U.S.C. § 30 (1982), the character of the deposit as lode is conclusively established as to any adverse claimant, and a subsequent challenge by

CONTESTS--Continued

such claimant asserting the claimed deposits are placer is properly rejected.

Melvin Helit, A-Able Plumbing, Inc., 110 IBLA 144 (Aug. 10, 1989)

Jurisdiction over disputes between rival mining claimants is reserved to the courts, and it is not for the Department to decide whether one claimant has a better right to a claim because the rival claimant has allegedly failed to file the document required under sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1976).

Rufus B. McIlroy, 111 IBLA 144 (Sept. 29, 1989)

DETERMINATION OF VALIDITY

A necessary element in any determination respecting the validity of a mining claim is the availability of the land for mining location. Until it has been determined that land is subject to mining location, any decision relating to the mineral character of land embraced in a mining claim or the sufficiency of a purported discovery is premature insofar as the validity of the claim is concerned.

The Mining Claims Rights Restoration Act of 1955 did not unqualifiedly reopen all lands withdrawn from entry by the Federal Power Act. Sec. 4 of the Mining Claims Rights Restoration Act of 1955 required locators to file location notices as to otherwise void claims within 1 year from the effective date of the Act, or within 60 days of the date of a new location. Where the requirements of sec. 4 of the Mining Claims Rights Restoration Act of 1955 were not met, claimants could not achieve valid existing rights in the claims by application of the principle of adoption, which does not apply against the United States.

Substantial compliance with the 1872 Mining Law, in the form of good faith acts of discovery and performance of assessment work, cannot confer vested rights,

DETERMINATION OF VALIDITY--Continued

or valid existing rights, where Congress has withdrawn lands from location prior to the good faith acts of the locator.

Where lands were withdrawn from mineral entry in 1922 pursuant to the Federal Power Act of 1920, and in 1975 pursuant to the Wild and Scenic Rivers Act, and claimants could not show that their claims were located prior to 1975 in accordance with the Mining Claims Rights Restoration Act of 1955, appellants had no valid existing rights, and the claims were properly declared null and void ab initio.

E. J. Belding, Jr., Melinda S. Belding, 109 IBLA 198 (June 12, 1989) 96 I.D. 272

When the Government contests mining claims on a charge of lack of discovery of a valuable mineral deposit, it has the burden of going forward with sufficient evidence to establish a prima facie case as to that charge; however, the mining claimant has the ultimate burden of refuting the Government's case by a preponderance of the evidence.

In order to establish a discovery, the evidence must disclose a mineral deposit such that a man of ordinary prudence would be justified in the expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine. This standard has been supplemented by the marketability test, requiring a showing that the mineral deposit can be mined, removed, and marketed at a profit.

United States v. Charles M. Crawford, dba Casi Mining & Mineral Exploration Co., 109 IBLA 264 (June 16, 1989)

A mining claim located in part on land withdrawn from appropriation under the mining laws is null and void ab initio in part.

Oscar E. Harding, 110 IBLA 117 (Aug. 7, 1989)

MINING CLAIMS--Continued

DETERMINATION OF VALIDITY--Continued

A mining claimant has standing to appeal from decisions declaring his claims invalid.

No amended location of a mining claim is possible if the original location was void. Filing an amended notice of location in such circumstances establishes no new rights.

Melvin Helit, A-Able Plumbing, Inc., 110 IBLA 144 (Aug. 10, 1989)

DISCOVERY

Generally

Substantial compliance with the 1872 Mining Law, in the form of good faith acts of discovery and performance of assessment work, cannot confer vested rights, or valid existing rights, where Congress has withdrawn lands from location prior to the good faith acts of the locator.

E. J. Belding, Jr., Melinda S. Belding, 109 IBLA 198 (June 12, 1989) 96 I.D. 272

In order to establish a discovery, the evidence must disclose a mineral deposit such that a man of ordinary prudence would be justified in the expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine. This standard has been supplemented by the marketability test, requiring a showing that the mineral deposit can be mined, removed, and marketed at a profit.

United States v. Charles M. Crawford, dba Casi Mining & Mineral Exploration Co., 109 IBLA 264 (June 16, 1989)

LANDS SUBJECT TO

BLM properly declares a placer mining claim null and void ab initio where it was located within one-quarter mile of a wild river clearly designated prior to the date of location by the Secretary of the Interior under the Wild and Scenic Rivers Act, as amended, 16 U.S.C. §§ 1271-1287 (1982), and thereby

MINING CLAIMS--Continued

LANDS SUBJECT TO--Continued

statutorily withdrawn from appropriation under the mining laws.

Andrew Van Atta, Mindy Wekselblatt, 106 IBLA 304 (Jan. 5, 1989)

Mining claims located on land patented by the United States without a mineral reservation or on land segregated from entry under the mining laws are null and void ab initio.

Santa Fe Resources, Inc., 106 IBLA 374 (Jan. 19, 1989)

Under sec. 9(a)(iii) of the Wild and Scenic Rivers Act of 1968, as amended, 16 U.S.C. § 1280(a)(iii) (1982), Federal lands within one-quarter mile of the bank of a river designated as a "wild" river are withdrawn from all forms of appropriation under the mining laws. Mining claims located thereafter on such lands are properly declared null and void ab initio.

Robert L. Payne et al., 107 IBLA 71 (Jan. 30, 1989)

A mining claim located on lands withdrawn for reclamation purposes under the first form is null and void ab initio. A first-form reclamation withdrawal completed prior to Oct. 21, 1976, remains in effect, subject to review by the Secretary, notwithstanding repeal of the statute authorizing the initiation of such withdrawals.

Leo & Florence Whiteman, 107 IBLA 118 (Feb. 2, 1989)

A mining claim located on lands subject to a first-form withdrawal at the time of location is null and void ab initio.

Stewart L. Ashton, 107 IBLA 140 (Feb. 6, 1989)

LANDS SUBJECT TO--Continued

A lode mining claim is properly declared null and void ab initio if, at the time of location, the land was withdrawn from appropriation under the mining laws of the United States.

George A. Sullivan, 107 IBLA 287 (Feb. 23, 1989)

Where a Federal district court issues a preliminary injunction which has the effect of reinstating the terms of a revoked reclamation withdrawal, which had precluded the location of mining claims, a mining claim located the day before the effective date of the preliminary injunction is not null and void ab initio, since on the date of location, the lands were open to the operation of the mining laws.

Harold Bennett et al., 107 IBLA 291 (Feb. 24, 1989)

Where a Federal district court issues a preliminary injunction which has the effect of suspending the termination of a multiple-use classification which segregated the land from mineral entry, thereby reinstating the terms of the classification, a mining claim subsequently located on land subject to that injunction is properly declared null and void ab initio.

Art Marinaccio, 107 IBLA 303 (Mar. 2, 1989)

Lands which are covered by a preliminary permit issued by the Federal Energy Regulatory Commission for a proposed power project are not open to mineral entry under sec. 2(a) of the Mining Claims Rights Restoration Act of 1955, 30 U.S.C. § 621(a) (1982), unless the land has been restored to entry under sec. 24 of the Federal Power Act, as amended, 16 U.S.C. § 818 (1982). Where a mining claim is located at a time when the lands are closed to entry under sec. 2(a) of the Mining Claims Rights Restoration Act, BLM properly declares the claim null and void ab initio.

Phillip L. Heintz, 108 IBLA 330 (May 2, 1989)

LANDS SUBJECT TO--Continued

A placer mining claim partially located on land patented without a reservation of minerals to the United States is properly declared null and void ab initio to the extent that it includes such land.

Kenneth Russell, 109 IBLA 180 (June 9, 1989)

A necessary element in any determination respecting the validity of a mining claim is the availability of the land for mining location. Until it has been determined that land is subject to mining location, any decision relating to the mineral character of land embraced in a mining claim or the sufficiency of a purported discovery is premature insofar as the validity of the claim is concerned.

E. J. Belding, Jr., Melinda S. Belding, 109 IBLA 198 (June 12, 1989) 96 I.D. 272

BLM may properly declare a mining claim located on land segregated from mineral entry, pursuant to 43 CFR 2627.4(b), by virtue of the filing of an Alaska State selection application, null and void ab initio when there is no showing that the claim relates back to a date of location prior to the segregation.

Sec. 906(e) of ANILCA, 43 U.S.C. § 1635(e) (1982), amended the Alaska Statehood Act to permit the State to file new applications to include lands which were not vacant, unappropriated, and unreserved at the time the sec. 906(e) "top filing" application was filed. Such State selection applications become an effective selection upon the date the lands become available within the meaning of the Alaska Statehood Act. Lands subject to valid mining claims on the date a state "top filing" application is filed become subject to state selection when the claims are abandoned, either intentionally or by action of law.

Vernon F. Miller, 110 IBLA 20 (July 6, 1989)

MINING CLAIMS--Continued

LANDS SUBJECT TO--Continued

A mining claim located in part on land withdrawn from appropriation under the mining laws is null and void ab initio in part.

Oscar E. Harding, 110 IBLA 117 (Aug. 7, 1989)

Upon issuance of a final certificate of mineral entry for mining claims, the lands encompassed by the claims are closed to mineral entry by another person, and any claims located thereafter on the lands covered by the final certificate are null and void ab initio.

Melvin Helit, A-Able Plumbing, Inc., 110 IBLA 144 (Aug. 10, 1989)

A mining claim located in a powersite at a time when the land was withdrawn from mineral entry is null and void ab initio. While the claimant may establish a new location pursuant to 30 U.S.C. § 38 (1982), by holding and working the claim for a specific period of time while the land is open to location, such a location must be recorded pursuant to sec. 314(b) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744(b) (1982). Failure to comply with the recordation provisions shall render any such location abandoned and void.

Steven R. Heady, Bruce G. Heady, 110 IBLA 245 (Aug. 31, 1989)

LOCATION

Nothing in either the Wild and Scenic Rivers Act, 16 U.S.C. §§ 1271-1287 (1982), nor the Act of Oct. 12, 1976, 90 Stat. 2327, which designated the Upper Missouri Wild and Scenic River as a component of the wild and scenic river system, automatically withdrew all land within the management boundaries of the Upper Missouri Wild and Scenic River, but beyond the one-quarter mile statutory withdrawal, from the operation of the mining laws.

John R. Lynn, Joe Trow, 106 IBLA 317 (Jan. 6, 1989)

MINING CLAIMS--Continued

LOCATION--Continued

The United States is not barred by the equitable defense of estoppel from enforcing public land laws. Moreover, BLM owes no duty to mining claimants to promptly ascertain the legal status of every claim filed and inform such claimants of its findings.

Kenneth Russell, 109 IBLA 180 (June 9, 1989)

No amended location of a mining claim is possible if the original location was void. Filing an amended notice of location in such circumstances establishes no new rights.

Melvin Helit, A-Able Plumbing, Inc., 110 IBLA 144 (Aug. 10, 1989)

A mining claim located in a powersite at a time when the land was withdrawn from mineral entry is null and void ab initio. While the claimant may establish a new location pursuant to 30 U.S.C. § 38 (1982), by holding and working the claim for a specific period of time while the land is open to location, such a location must be recorded pursuant to sec. 314(b) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744(b) (1982). Failure to comply with the recordation provisions shall render any such location abandoned and void.

Steven R. Heady, Bruce G. Heady, 110 IBLA 245 (Aug. 31, 1989)

MARKETABILITY

In order to establish a discovery, the evidence must disclose a mineral deposit such that a man of ordinary prudence would be justified in the expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine. This standard has been supplemented by the marketability test, requiring a showing that the mineral deposit can be mined, removed, and marketed at a profit.

United States v. Charles M. Crawford, dba Casi Mining & Mineral Exploration Co., 109 IBLA 264 (June 16, 1989)

MILLSITES

The failure to file an annual notice of intention to hold a millsite claim is a curable defect, and BLM may not declare a millsite abandoned and void without first according the claimant an opportunity to comply with the notice of deficiency. Where, owing to misdelivery of BLM's decision providing such opportunity and BLM's misstatement of applicable appeal procedures, claimant may not have been aware of such opportunity, the claimant may be provided with an additional opportunity on remand.

Jean Emanuel Hatton, Eva M. Pool, Phillip Emanuel, 107 IBLA 47 (Jan. 27, 1989)

The Department has long followed the rule that transmission of a document to a party's last address of record by registered or certified mail, return receipt requested, constitutes constructive service even though delivery was unsuccessful. However, a party may defeat application of the rule by showing error in Postal Service procedure amounting to negligence in transmitting the decision.

David Robertson, 107 IBLA 114 (Feb. 2, 1989)

PATENT

Unless a final certificate has been issued, an applicant for a patent to mining claim is not excused under 43 CFR 3833.2-4 from the requirement to file annually an affidavit of assessment work or notice of intention to hold the claim with BLM under 43 U.S.C. § 1744 (1982).

The purchase price for lands covered by an application for mineral patent is not properly submitted until after it is established that no adverse claim or other objection appears. Where the record establishes that there were significant problems with a patent application requiring resolution before purchase money could properly be tendered and final certificate issued, the premature payment and acceptance of mineral patent purchase price neither creates any right to receive

PATENT--Continued

certificate of title nor lifts the obligation to comply with the recordation provisions of the Federal Land Policy and Management Act of 1976.

BLM properly rejects a patent application for mining claims which have become invalid because the claimant failed to file a copy of his affidavit of assessment work as required by 43 U.S.C. § 1744 (1982).

U. A. Small, 108 IBLA 102 (Mar. 29, 1989)

Failure to file in the proper Bureau of Land Management office either evidence of assessment work performed or notice of intention to hold as required by 43 U.S.C. § 1744 (1982), and 43 CFR 3833.2 within the time period prescribed results in a conclusive presumption of abandonment of the mining claim. Only where a patent application has been filed and a final certificate has been issued will a mining claimant be excused under 43 CFR 3833.2-4 from complying with the filing requirement.

B. J. Londo et al., 109 IBLA 353 (June 23, 1989)

Upon issuance of a final certificate of mineral entry for mining claims, the lands encompassed by the claims are closed to mineral entry by another person, and any claims located thereafter on the lands covered by the final certificate are null and void ab initio.

When a rival mining claimant files an adverse claim against a mineral patent application, the adverse claimant is required to commence proceedings in a court of competent jurisdiction within 30 days after filing his claim, and failure so to do shall be a waiver of his adverse claims.

Where an application for mineral patent of lode claims is filed and no adverse claim is asserted as required by 30 U.S.C. § 30 (1982), the character of the deposit as lode is conclusively established as to any adverse claimant, and a subsequent challenge by such claimant asserting the claimed deposits are placer is properly rejected.

A corporation organized under the laws of the United States or of any state or territory thereof may

MINING CLAIMS--Continued

PATENT--Continued

occupy and purchase mining claims from the Government, irrespective of the ownership of stock therein by persons, corporations, or associations not citizens of the United States.

Melvin Helit, A-Able Plumbing, Inc., 110 IBLA 144 (Aug. 10, 1989)

The evidence of title required by regulation at 43 CFR 3862.103 in support of a mineral patent application should reflect those documents of record, including notice of location, deeds, and other instruments, purporting to convey or affect title to the claim which the applicant is seeking to patent. The applicant is not required to show his title is superior to all other claims of record, but that he is the successor to possessory title dating back to the original location of the claim which he seeks to patent.

Geoffrey J. Garcia, Charlotte M. Garcia, 111 IBLA 148 (Sept. 29, 1989)

PLACER CLAIMS

A placer mining claim partially located on land patented without a reservation of minerals to the United States is properly declared null and void ab initio to the extent that it includes such land.

Kenneth Russell, 109 IBLA 180 (June 9, 1989)

PLAN OF OPERATIONS

Approval of a mining plan of operations will be affirmed where the record indicates that BLM examined and carefully considered the plan of operations, reviewed environmental impacts and properly conditioned approval of the plan on the performance of measures to mitigate or prevent any environmental degradation.

The mere assertion that mining claims were located while the land was closed to mineral entry, unsupported

MINING CLAIMS--Continued

PLAN OF OPERATIONS--Continued

by probative evidence of that fact, provides an insufficient basis for the rejection of a mining plan of operations filed with respect to such claims.

Department of the Navy, 108 IBLA 334 (May 8, 1989)

A group that has not participated in agency decisionmaking prior to approval by BLM of a mining plan of operations is not a "party to a case" within the meaning of 43 CFR 4.410(a) for purposes of appeal.

Except in areas under wilderness review, mining plans of operations become effective immediately upon the approval pursuant to provision of 43 CFR 3809.4(b). This regulatory provision makes approval of a mining plan of operations a final Departmental action immediately subject to judicial review.

To obtain standing for review by the Board of Land Appeals a party must have participated in Bureau of Land Management decisionmaking prior to issuance of the decision sought to be reviewed. Even though a group may be adversely affected by decisionmaking, it lacks standing to appeal if it is not a party to the case.

The Wilderness Society, 110 IBLA 67 (July 20, 1989)

Jurisdiction over disputes between rival mining claimants is reserved to the courts, and it is not for this Department to decide whether one claimant has a better right to a claim than a rival claimant. Approval of a mining plan of operations is based upon a determination that such operations will not result in unnecessary or undue degradation of Federal lands, and not on a determination that the party submitting the plan of operations will be able to conduct the proposed operations without trespassing on lands held by others. Therefore, one seeking to prevent operations outlined in a plan of operations submitted to BLM because such operations allegedly would result in trespass should seek such relief in a court of competent jurisdiction.

Rufus B. McIlroy, 111 IBLA 144 (Sept. 29, 1989)

POSSESSORY RIGHT

The Mining Claims Rights Restoration Act of 1955 did not unqualifiedly reopen all lands withdrawn from entry by the Federal Power Act. Sec. 4 of the Mining Claims Rights Restoration Act of 1955 required locators to file location notices as to otherwise void claims within 1 year from the effective date of the Act, or within 60 days of the date of a new location. Where the requirements of sec. 4 of the Mining Claims Rights Restoration Act of 1955 were not met, claimants could not achieve valid existing rights in the claims by application of the principle of adoption, which does not apply against the United States.

E. J. Belding, Jr., Melinda S. Belding, 109 IBLA 198 (June 12, 1989) 96 I.D. 272

A mining claim located in a powersite at a time when the land was withdrawn from mineral entry is null and void ab initio. While the claimant may establish a new location pursuant to 30 U.S.C. § 38 (1982), by holding and working the claim for a specific period of time while the land is open to location, such a location must be recorded pursuant to sec. 314(b) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744(b) (1982). Failure to comply with the recordation provisions shall render any such location abandoned and void.

Steven R. Heady, Bruce G. Heady, 110 IBLA 245 (Aug. 31, 1989)

POWERSITE LANDS

Lands which are covered by a preliminary permit issued by the Federal Energy Regulatory Commission for a proposed power project are not open to mineral entry under sec. 2(a) of the Mining Claims Rights Restoration Act of 1955, 30 U.S.C. § 621(a) (1982), unless the land has been restored to entry under sec. 24 of the Federal Power Act, as amended, 16 U.S.C. § 818 (1982). Where a mining claim is located at a time when the lands are closed to entry under sec. 2(a) of the Mining Claims Rights Restoration Act, BLM properly declares the claim null and void ab initio.

Phillip L. Heintz, 108 IBLA 330 (May 2, 1989)

MINING CLAIMS--Continued

POWERSITE LANDS--Continued

The Mining Claims Rights Restoration Act of 1955 did not unqualifiedly reopen all lands withdrawn from entry by the Federal Power Act. Sec. 4 of the Mining Claims Rights Restoration Act of 1955 required locators to file location notices as to otherwise void claims within 1 year from the effective date of the Act, or within 60 days of the date of a new location. Where the requirements of sec. 4 of the Mining Claims Rights Restoration Act of 1955 were not met, claimants could not achieve valid existing rights in the claims by application of the principle of adoption, which does not apply against the United States.

E. J. Belding, Jr., Melinda S. Belding, 109 IBLA 198 (June 12, 1989) 96 I.D. 272

RECORDATION

The acceptance of a mining claim filing for recordation does not preclude BLM from subsequently declaring the claim to be null and void ab initio upon a finding that the land on which the claim was located was withdrawn from the location of mining claims at the time the claim was located.

Robert L. Payne et al., 107 IBLA 71 (Jan. 30, 1989)

Under sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1982), the owner of an unpatented mining claim located on public land must file a notice of intention to hold the mining claim or evidence of annual assessment work on the claim prior to Dec. 31 of each year in the proper office of the Bureau of Land Management. There is no provision for waiver of this mandatory requirement, and where a notice of intention to hold or evidence of assessment work is not timely filed, for whatever reason, the consequence must be borne by the claimant.

The filing of a quitclaim deed relating to a mining claim does not, standing alone, constitute a notice of intention to hold the mining claim. Such a deed merely evidences present ownership, not an intention to hold in the future.

George McGowan, 109 IBLA 1 (May 22, 1989)

MINING CLAIMS--Continued

RECORDATION--Continued

BLM may properly declare an unpatented mining claim abandoned and void when a claimant fails to file either evidence of annual assessment work or a notice of intent to hold the claim on or before Dec. 30 of a calendar year.

The provisions of 43 CFR 3833.4(b) apply to the filing of supplemental information not specifically called for in 43 U.S.C. § 1744 (1982), and the filing of notices of intention to hold millsites and tunnel site claims. The latitude set out in 43 CFR 3833.4(b) is not available if no annual filing has been made for a lode or placer mining claim, and, in such case, the Department is without authority to allow a 30-day period after notice for a claimant to file the required documents.

David R. Jacques, 109 IBLA 69 (May 30, 1989)

Failure to file in the proper Bureau of Land Management office either evidence of assessment work performed or notice of intention to hold as required by 43 U.S.C. § 1744 (1982), and 43 CFR 3833.2 within the time period prescribed results in a conclusive presumption of abandonment of the mining claim.

Donald G. Sterner, 109 IBLA 76 (May 30, 1989)

Daniel D. Draper, 109 IBLA 85 (May 31, 1989)

Where, in response to an inquiry from BLM regarding the exact situs of a mining claim, the claimant submits a professional survey map, along with a copy of a master title plat upon which the location of the claim has been depicted, BLM may rely on those documents to determine the location of the mining claim.

Kenneth Russell, 109 IBLA 180 (June 9, 1989)

MINING CLAIMS--Continued

RECORDATION--Continued

Failure to file in the proper Bureau of Land Management office either evidence of assessment work performed or notice of intention to hold as required by 43 U.S.C. § 1744 (1982), and 43 CFR 3833.2 within the time period prescribed results in a conclusive presumption of abandonment of the mining claim. Only where a patent application has been filed and a final certificate has been issued will a mining claimant be excused under 43 CFR 3833.2-4 from complying with the filing requirement.

B. J. Londo et al., 109 IBLA 353 (June 23, 1989)

Failure to file in the proper Bureau of Land Management office either evidence of work performed or notice of intention to hold as required by 43 U.S.C. § 1744 (1982), and 43 CFR 3833.2 within the time period prescribed results in a conclusive presumption of abandonment of the mining claim. Under 43 CFR 3833.0-5(m), a document which is mailed will be considered timely filed provided it bears a clearly dated postmark affixed by the U.S. Postal Service on or before the filing deadline. Where an envelope received by BLM after the Dec. 30 end of the filing period does not bear a postmark date falling within the filing period, the regulation will not apply and the filing is therefore untimely.

Chemical Products Corp., 109 IBLA 357 (June 23, 1989)

An unpatented mining claim is properly declared abandoned and void when a claimant fails to file either evidence of annual assessment work or a notice of intent to hold the claim on or before Dec. 30 of a calendar year.

Doyle C. Cape, 110 IBLA 16 (July 6, 1989)

RECORDATION--Continued

A mining claim located in a powersite at a time when the land was withdrawn from mineral entry is null and void ab initio. While the claimant may establish a new location pursuant to 30 U.S.C. § 38 (1982), by holding and working the claim for a specific period of time while the land is open to location, such a location must be recorded pursuant to sec. 314(b) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744(b) (1982). Failure to comply with the recordation provisions shall render any such location abandoned and void.

Steven R. Heady, Bruce G. Heady, 110 IBLA 245 (Aug. 31, 1989)

Jurisdiction over disputes between rival mining claimants is reserved to the courts, and it is not for the Department to decide whether one claimant has a better right to a claim because the rival claimant has allegedly failed to file the document required under sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1976).

Rufus B. McIlroy, 111 IBLA 144 (Sept. 29, 1989)

RELOCATION

BLM may properly declare a mining claim located on land segregated from mineral entry, pursuant to 43 CFR 2627.4(b), by virtue of the filing of an Alaska State selection application, null and void ab initio when there is no showing that the claim relates back to a date of location prior to the segregation.

Sec. 906(e) of ANILCA, 43 U.S.C. § 1635(e) (1982), amended the Alaska Statehood Act to permit the State to file new applications to include lands which were not vacant, unappropriated, and unreserved at the time the sec. 906(e) "top filing" application was filed. Such State selection applications become an effective selection upon the date the lands become available within the meaning of the Alaska Statehood Act. Lands subject to valid mining claims on the date a state "top filing"

RELOCATION--Continued

application is filed become subject to state selection when the claims are abandoned, either intentionally or by action of law.

In order to show that the documents filed subsequent to withdrawal of the land from mineral entry are intended to be amendments of claims located prior to withdrawal, the claimant must establish that the documents he filed were notices of amendment of mineral claims located prior to the withdrawal and that those claims were in good standing on the date of amendment. Without such proof, BLM may properly conclude that the claimant relocated the claims and had no rights by relation back to a prior claim.

Vernon F. Miller, 110 IBLA 20 (July 6, 1989)

No amended location of a mining claim is possible if the original location was void. Filing an amended notice of location in such circumstances establishes no new rights.

Melvin Helit, A-Able Plumbing, Inc., 110 IBLA 144 (Aug. 10, 1989)

SURFACE USES

Fish and fish habitats are "other surface resources" which the Department of the Interior has authority to manage on the surface of mining claims under subsec. 4(b) of the Surface Resources Act, 30 U.S.C. § 612(b) (1982).

The Surface Resources Act granted Federal agencies authority to manage and dispose of the resources found on the surface of mining claims. When Federal management of surface resources conflicts with the legitimate use of the surface or surface resources by a mineral locator so as to endanger or materially interfere with prospecting, mining, or processing operations, or uses reasonably incident thereto, Federal management must yield to mining as the dominant and primary use.

MINING CLAIMS--Continued

SURFACE USES--Continued

"Endanger" and "materially interfere." The terms "endanger" and "materially interfere" used in subsec. 4(b) of the Surface Resources Act, 30 U.S.C. § 612(b) (1982), set forth the standard to be applied to determine whether a specific surface management action must yield to a conflicting legitimate use by a mining claimant. Where there is no evidence that such action endangers the claimant's operations, the question is whether the surface management activity will substantially hinder, impede, or clash with mining operations or a reasonably related use.

Robert E. Shoemaker, 110 IBLA 39 (July 13, 1989)
96 I.D. 315

TITLE

The evidence of title required by regulation at 43 CFR 3862.103 in support of a mineral patent application should reflect those documents of record, including notice of location, deeds, and other instruments, purporting to convey or affect title to the claim which the applicant is seeking to patent. The applicant is not required to show his title is superior to all other claims of record, but that he is the successor to possessory title dating back to the original location of the claim which he seeks to patent.

Geoffrey J. Garcia, Charlotte M. Garcia, 111 IBLA 148 (Sept. 29, 1989)

WITHDRAWN LAND

BLM properly declares a placer mining claim null and void ab initio where it was located within one-quarter mile of a wild river clearly designated prior to the date of location by the Secretary of the Interior under the Wild and Scenic Rivers Act, as amended, 16 U.S.C. §§ 1271-1287 (1982), and thereby statutorily withdrawn from appropriation under the mining laws.

Andrew Van Atta, Mindy Wekselblatt, 106 IBLA 304 (Jan. 5, 1989)

MINING CLAIMS--Continued

WITHDRAWN LAND--Continued

Nothing in either the Wild and Scenic Rivers Act, 16 U.S.C. §§ 1271-1287 (1982), nor the Act of Oct. 12, 1976, 90 Stat. 2327, which designated the Upper Missouri Wild and Scenic River as a component of the wild and scenic river system, automatically withdrew all land within the management boundaries of the Upper Missouri Wild and Scenic River, but beyond the one-quarter mile statutory withdrawal, from the operation of the mining laws.

John R. Lynn, Joe Trow, 106 IBLA 317 (Jan. 6, 1989)

Under sec. 9(a)(iii) of the Wild and Scenic Rivers Act of 1968, as amended, 16 U.S.C. § 1280(a)(iii) (1982), Federal lands within one-quarter mile of the bank of a river designated as a "wild" river are withdrawn from all forms of appropriation under the mining laws. Mining claims located thereafter on such lands are properly declared null and void ab initio.

Robert L. Payne et al., 107 IBLA 71 (Jan. 30, 1989)

A lode mining claim is properly declared null and void ab initio if, at the time of location, the land was withdrawn from appropriation under the mining laws of the United States.

George A. Sullivan, 107 IBLA 287 (Feb. 23, 1989)

The Mining Claims Rights Restoration Act of 1955 did not unqualifiedly reopen all lands withdrawn from entry by the Federal Power Act. Sec. 4 of the Mining Claims Rights Restoration Act of 1955 required locators to file location notices as to otherwise void claims within 1 year from the effective date of the Act, or within 60 days of the date of a new location. Where the requirements of sec. 4 of the Mining Claims Rights Restoration Act of 1955 were not met, claimants could not achieve valid existing rights in the claims by application of the principle of adoption, which does not apply against the United States.

WITHDRAWN LAND--Continued

Substantial compliance with the 1872 Mining Law, in the form of good faith acts of discovery and performance of assessment work, cannot confer vested rights, or valid existing rights, where Congress has withdrawn lands from location prior to the good faith acts of the locator.

Where lands were withdrawn from mineral entry in 1922 pursuant to the Federal Power Act of 1920, and in 1975 pursuant to the Wild and Scenic Rivers Act, and claimants could not show that their claims were located prior to 1975 in accordance with the Mining Claims Rights Restoration Act of 1955, appellants had no valid existing rights, and the claims were properly declared null and void ab initio.

E. J. Belding, Jr., Melinda S. Belding, 109 IBLA 198 (June 12, 1989) 96 I.D. 272

BLM may properly declare a mining claim located on land segregated from mineral entry, pursuant to 43 CFR 2627.4(b), by virtue of the filing of an Alaska State selection application, null and void ab initio when there is no showing that the claim relates back to a date of location prior to the segregation.

Sec. 906(e) of ANILCA, 43 U.S.C. § 1635(e) (1982), amended the Alaska Statehood Act to permit the State to file new applications to include lands which were not vacant, unappropriated, and unreserved at the time the sec. 906(e) "top filing" application was filed. Such State selection applications become an effective selection upon the date the lands become available within the meaning of the Alaska Statehood Act. Lands subject to valid mining claims on the date a state "top filing" application is filed become subject to state selection when the claims are abandoned, either intentionally or by action of law.

Vernon F. Miller, 110 IBLA 20 (July 6, 1989)

WITHDRAWN LAND--Continued

A mining claim located in part on land withdrawn from appropriation under the mining laws is null and void ab initio in part.

Oscar E. Harding, 110 IBLA 117 (Aug. 7, 1989)

MINING CLAIMS RIGHTS RESTORATION ACT

The Mining Claims Rights Restoration Act of 1955 did not unqualifiedly reopen all lands withdrawn from entry by the Federal Power Act. Sec. 4 of the Mining Claims Rights Restoration Act of 1955 required locators to file location notices as to otherwise void claims within 1 year from the effective date of the Act, or within 60 days of the date of a new location. Where the requirements of sec. 4 of the Mining Claims Rights Restoration Act of 1955 were not met, claimants could not achieve valid existing rights in the claims by application of the principle of adoption, which does not apply against the United States.

Where lands were withdrawn from mineral entry in 1922 pursuant to the Federal Power Act of 1920, and in 1975 pursuant to the Wild and Scenic Rivers Act, and claimants could not show that their claims were located prior to 1975 in accordance with the Mining Claims Rights Restoration Act of 1955, appellants had no valid existing rights, and the claims were properly declared null and void ab initio.

E. J. Belding, Jr., Melinda S. Belding, 109 IBLA 198 (June 12, 1989) 96 I.D. 272

NATIONAL ENVIRONMENTAL POLICY ACT OF 1969

ENVIRONMENTAL STATEMENTS

A determination that a proposed action will not have a significant impact on the quality of the human environment will be affirmed on appeal if the record establishes that a careful review of environmental problems has been made, relevant areas of environmental concern have been identified, and the final determination is reasonable. The party challenging a determination must show that the determination was

NATIONAL ENVIRONMENTAL POLICY ACT OF 1969--Continued

ENVIRONMENTAL STATEMENTS--Continued

premised on a clear error of law, a demonstrable error of fact, or that the analysis failed to consider a substantial environmental question of material significance to the action for which the analysis was prepared. Mere differences of opinion provide no basis for reversal if BLM's decision is reasonable and supported by the record on appeal.

The Sierra Club, Inc., et al., 107 IBLA 96 (Feb. 1, 1989)

A BLM decision approving an application for a permit to drill within a designated resource protection zone surrounding units of the Hovenweep National Monument will be reversed where, in the course of its assessment of the environmental impact of proposed drilling and associated road improvement activity, BLM failed to consider the potential cumulative impact of such activity in conjunction with other existing and proposed drilling and production of wells and associated road improvement activity within the protection zone.

Colorado Environmental Coalition et al., 108 IBLA 10 (Mar. 20, 1989)

No violation of the National Environmental Policy Act of 1969 occurs upon BLM's issuance of a right-of-way authorizing construction of an all-weather road through the wintering habitat of an elk herd if the environmental impact statement accompanying this action adequately describes the impacts of such road, as mitigated by a seasonal road closure adopted as a part of the right-of-way grant.

The Shoshone-Bannock Tribes, The Wilderness Society et al., 108 IBLA 198 (Apr. 17, 1989)

BLM is not required to prepare an EIS at the lease issuance stage where it adopts a staged leasing program and determines that all post-lease development plans are subject to site-specific environmental review and that development might be limited or denied if such review discloses that unacceptable impacts on other land uses or resources would result. Accordingly, where BLM and the Forest Service nevertheless do prepare an EIS

NATIONAL ENVIRONMENTAL POLICY ACT OF 1969--Continued

ENVIRONMENTAL STATEMENTS--Continued

announcing that proposals for actual development of the leases will be subject to further environmental analysis, the Board will not interfere with a decision based on the EIS because of alleged inadequacies therein.

Southern Utah Wilderness Alliance et al., 108 IBLA 318 (Apr. 28, 1989)

An individual who submits proof of residing within three-fourths of a mile of a coal preparation plant, and shows that he may be adversely affected by traffic and air pollution caused by coal trucks transporting coal to the plant has standing within the meaning of 30 CFR 700.5 to seek review of OSMRE's approval of a permit to operate the plant.

A determination that approval of a permit for a coal preparation plant will not have a significant impact on groundwater, based on an environmental assessment, will be affirmed on appeal if the record establishes that a careful review of environmental problems has been undertaken; relevant environmental concerns have been identified; and the final determination is reasonable in light of the environmental analysis.

Frank Stebly v. Office of Surface Mining Reclamation & Enforcement, 109 IBLA 242 (June 16, 1989)

Where an R.S. 2477 right-of-way is found to exist across public lands for a county road bordering WSAs, the right to maintain and improve that right-of-way, measured by what is reasonable and necessary in light of preexisting uses of the road at the time of repeal of R.S. 2477, constitutes a valid existing right under FLPMA. Notwithstanding this limitation on the authority of BLM, the obligation of BLM under sec. 603(c) of FLPMA to manage the public lands so as to avoid unnecessary and undue degradation of WSAs may require preparation of an environmental assessment with respect to the impact of construction of road improvements proposed by the county to ascertain whether they may

ENVIRONMENTAL STATEMENTS--Continued

involve any unnecessary or undue degratdation to WSAs which would require preparation of an environmental impact statement.

An environmental assessment of a proposed road improvment project will be set aside and remanded where the scope of the project is segmented and the assessment fails to consider the impact of connected actions which are interdependent parts of a larger action and depend on the larger action for their justification.

Sierra Club et al., 111 IBLA 122 (Sept. 29, 1989)

NATIONAL HISTORIC PRESERVATION ACT

GENERALLY

Where issuance of a right-of-way for a dam and reservoir in an area likely to contain archaeological artifacts is conditioned upon a stipulation requiring the holder to assume the responsibility for testing and/or mitigation of impacts to sites discovered as a result of operations pursuant to the right-of-way, a decision requiring compliance with that stipulation will be affirmed on appeal.

A stipulation imposing liability on a right-of-way holder for mitigation of impacts to cultural resources discovered as a result of operations under the right-of-way will be enforced according to its terms. Where 90 percent of the land embraced in a cultural resources site discovered as a result of operations under a right-of-way is situated on public land and/or private land outside the boundary of the right-of-way, the liability of the holder for mitigation expenses will be upheld for portions of the site within the right-of-way in the absence of language imposing liability for sites outside the right-of-way grant.

Water Users Ass'n No. 1, 108 IBLA 166 (Apr. 11, 1989)

GENERALLY--Continued

OSMRE is authorized, pursuant to the National Historic Preservation Act, to impose upon an applicant for an underground coal mining permit a cultural resources condition requiring submission of a cultural resources plan including the archaeological testing of 11 sites to evaluate their eligibility for listing in the National Register of Historic Places; a cultural resource survey of areas affected by planned subsidence; and measures to be taken to mitigate disturbance of any site or sites listed in or eligible for listing in the National Register of Historic Places.

Old Ben Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 109 IBLA 362 (June 23, 1989)

APPLICABILITY

Where issuance of a right-of-way for a dam and reservoir in an area likely to contain archaeological artifacts is conditioned upon a stipulation requiring the holder to assume the responsibility for testing and/or mitigation of impacts to sites discovered as a result of operations pursuant to the right-of-way, a decision requiring compliance with that stipulation will be affirmed on appeal.

A stipulation imposing liability on a right-of-way holder for mitigation of impacts to cultural resources discovered as a result of operations under the right-of-way will be enforced according to its terms. Where 90 percent of the land embraced in a cultural resources site discovered as a result of operations under a right-of-way is situated on public land and/or private land outside the boundary of the right-of-way, the liability of the holder for mitigation expenses will be upheld for portions of the site within the right-of-way in the absence of language imposing liability for sites outside the right-of-way grant.

Water Users Ass'n No. 1, 108 IBLA 166 (Apr. 11, 1989)

NOTICE

GENERALLY

The Department has long followed the rule that transmission of a document to a party's last address of record by registered or certified mail, return receipt requested, constitutes constructive service even though delivery was unsuccessful. However, a party may defeat application of the rule by showing error in Postal Service procedure amounting to negligence in transmitting the decision.

David Robertson, 107 IBLA 114 (Feb. 2, 1989)

Upon a determination that production has ceased on an oil and gas lease in its extended term by reason of such production because the well on the lease is no longer capable of production in paying quantities, the affected parties are entitled to notice and an opportunity to request a hearing on the issue of the productive capacity of the well where they have presented evidence raising an issue of fact regarding the status of the well.

Daymon D. Gililland, 108 IBLA 144 (Apr. 5, 1989)

"Last address of record." In the processing of an application for assignment of a coal lease, the last address of record for the purposes of 43 CFR 1810.2(b) is the address stated on the application unless the applicant or an authorized representative has filed written notice of a change of address. When an application is accompanied by a letter from the applicant's attorney which states that the attorney is to be contacted concerning certain matters, the attorney's address is the "last address of record," and delivery of a document to that address constitutes service of the document upon the applicant, regardless of whether it was actually received by the attorney. Where the address provided by the attorney does not specify a suite, office number, or floor, "delivery" of the document is accomplished when it is received in the building indicated in the address.

5M, Inc., 109 IBLA 334 (June 22, 1989)

NOTICE--Continued

GENERALLY--Continued

A party is not required to appeal from a BLM letter which does not adversely affect it, is informative in nature, and does not set forth appeal rights.

Chevron U.S.A. Inc., 111 IBLA 96 (Sept. 28, 1989)

CONSTRUCTIVE NOTICE

The Department has long followed the rule that transmission of a document to a party's last address of record by registered or certified mail, return receipt requested, constitutes constructive service even though delivery was unsuccessful. However, a party may defeat application of the rule by showing error in Postal Service procedure amounting to negligence in transmitting the decision.

David Robertson, 107 IBLA 114 (Feb. 2, 1989)

Where an oil and gas lessee has entered into a seller's representative agreement and designated the operator of the lease as its representative for the tender of royalty payments to the United States, service of documents relating to those payments on the operator constitutes effective service upon the lessee.

Transco Exploration Co. & TXP Operating Co., 110 IBLA 282 (Sept. 13, 1989) 96 I.D. 367

OIL AND GAS

PIPELINES

Rights-of-Ways

A BLM appraisal of a right-of-way for a compressor station will be affirmed on appeal where the right-of-way holder has not demonstrated that it was error for BLM to use a market survey of comparable transactions involving the issuance of private rights-of-way rather

than the fee schedule for linear rights-of-way or the "before and after" appraisal method.

Colorado Interstate Gas Co., 110 IBLA 171 (Aug. 14, 1989)

OIL AND GAS LEASES

GENERALLY

An NTL-4A requiring compensation for the venting or flaring of natural gas in the absence of authorization was promulgated in the exercise of the Department's statutory and regulatory authority to require lessees to market oil and gas produced from the lease if economically feasible. A decision of BLM conclusively presuming that gas flared without prior authorization was avoidably lost, will be set aside and the case remanded to determine whether in fact it was economically feasible to market the gas at the time it was flared where BLM has since changed its interpretation of NTL-4A to give the lessee notice and an opportunity to show the gas was not marketable at the time and where it appears this interpretation is consistent with the intent of the underlying statutory and regulatory authority.

Ladd Petroleum Corp., Patrick Petroleum Corp. of Michigan, 107 IBLA 5 (Jan. 24, 1989)

The Department has the authority to issue NTL's for Federal leases. NTL-4A governs compensation for oil and gas which is lost by an operator. Unless specifically allowed by the provisions of NTL-4A, venting or flaring of oil well gas must be approved in writing by an authorized officer. Unless it can be shown that it was uneconomic to recover the gas at the time it was vented or flared, gas which is vented or flared without prior authorization, approval, ratification, or acceptance is deemed to be avoidably

lost. When produced gas is avoidably lost, the compensation due the United States is computed on the basis of the value of the gas avoidably lost, or the allocated portion thereof attributable to the lease.

The Department is entitled to rely on the reasoned analysis of its technical experts in matters within the realm of their expertise. If BLM supports a decision regarding the volume of gas avoidably lost by an operator with sufficient evidence to demonstrate a rational basis for that decision and that the decision was made in a careful and systematic manner, using the advice of such experts, the decision will not be rejected without a showing of error. The party challenging the decision has the burden of showing by a preponderance of the evidence that the determination is erroneous.

Mallon Oil Co., 107 IBLA 150 (Feb. 10, 1989)

A person challenging a Departmental determination that lands are within a KGS has the burden of showing by a preponderance of the evidence that the determination is in error. To establish the preponderance of the evidence means to prove that something is more likely so than not; in other words, "the preponderance of the evidence" means such evidence, when considered and compared with the opposite to it, has more convincing force and produces in your mind's belief that what is sought to be proved is more likely to be true than not.

The Secretary of the Interior has traditionally delegated the responsibility for determining the existence and extent of a KGS to his technical experts in the field. When a technical expert makes a determination that lands qualify for inclusion in a KGS, the Secretary is entitled to rely upon his reasoning. On the other hand, the determination of whether the lands are properly included in a KGS is largely dependent upon factual interpretation, and when there is a material issue of fact determinative of the issues posed, this Board has the discretionary authority to order a hearing on the matter before an Admininstrative Law Judge pursuant to 43 CFR 4.415.

Harry Ptasynski, 107 IBLA 197 (Feb. 15, 1989)

OIL AND GAS LEASES--Continued

GENERALLY--Continued

When oil and gas leases are issued pursuant and subject to all regulations of the Secretary "now or hereafter in force," the Secretary is not limited to enforcing only those regulations in effect at the time of lease execution.

Coastal Oil and Gas Corp., et al., 108 IBLA 62 (Mar. 22, 1989)

Where BLM issues a decision conclusively presuming that gas flared on a Federal oil and gas lease without prior authorization from BLM was "avoidably lost," and where BLM subsequently issues an instruction memorandum adopting a significant change in the interpretation of BLM policy concerning determinations of whether gas flared from Federal and Indian leases is "avoidably lost" and directing BLM to review all prior determinations of avoidable loss to conform them to the new policy, BLM's decision will be vacated and the case remanded for further review under the terms of the new policy.

Willard Pease Oil & Gas Co., 108 IBLA 108 (Mar. 29, 1989)

Under sec. 306 of the Act of Sept. 28, 1984 (the Utah Wilderness Act), Congress authorized BLM to issue leases for carbon dioxide gas in five areas within the Escalante KGS, subject to express restrictions on "exploration" and "development." Where BLM offers the areas for lease subject to a stipulation that fails adequately to enforce the statutory restrictions, and where BLM imposes this stipulation on only three of these five areas covered by sec. 306 of this Act, BLM's decision to receive bids on these areas will be set aside and the case remanded for issuance of leases of the five areas without the stipulation.

BLM is not required to prepare an EIS at the lease issuance stage where it adopts a staged leasing program and determines that all post-lease development plans are subject to site-specific environmental review and that development might be limited or denied if such review discloses that unacceptable impacts on other land uses or resources would result. Accordingly, where BLM and the Forest Service nevertheless do prepare an EIS announcing that proposals for actual development of

OIL AND GAS LEASES--Continued

GENERALLY--Continued

the leases will be subject to further environmental analysis, the Board will not interfere with a decision based on the EIS because of alleged inadequacies therein.

Southern Utah Wilderness Alliance et al., 108 IBLA 318 (Apr. 28, 1989)

BLM may properly require a reasonable contingency plan for salinity control in stipulations to a permit for surface discharge of water pursuant to the provisions of Notice to Lessees and Operators of Federal and Indian Oil and Gas Lessees (NTL-2B), and the regulations in 43 CFR 3162.5-1 which control disposition of water produced during production of oil and gas on Federal lands. NTL-2B sets forth requirements for handling, storage, or disposal of water produced from oil and gas wells with which all lessees must comply. Methods of water disposal used by a lessee must be approved by BLM.

A. G. Andrikopoulos Oil & Gas Properties, 108 IBLA 369 (May 17, 1989)

BLM may properly grant a right-of-way for a crude oil pipeline across a Federal oil and gas lease where BLM has adequately considered all relevant factors, including various alternative routes proposed by the lessee, and determined that only the selected route does not cross protected wetlands; that the selected route is consistent with BLM policy favoring the issuance of rights-of-way adjacent to existing facilities; and that the selected route does not, in any material respect, interfere with or diminish the rights granted to the lessee under its lease.

Arnell Oil Co., 110 IBLA 80 (July 26, 1989)

GENERALLY--Continued

The Director, MMS, held that the lessee violated 30 CFR 250.41(a)(2) because it knew or should have known that its actions could result in a blowout leading to the loss of gas. The lessee has responded claiming that, based upon information available to it during drilling, its actions were reasonable and prudent, and that the sole cause of the well loss was unforseeable. The record presents unresolved factual issues, and a hearing before an Administrative Law Judge is ordered.

Chevron U.S.A. Inc., et al., 110 IBLA 216 (Aug. 23, 1989)

For onshore operations, the congressional grant of authority, found at 30 U.S.C. § 226(j) (1982), authorizes the Secretary to order the combining of units and participating areas for conservation reasons. Included in this grant is the authority to approve any unit plan he may deem necessary or proper to secure the proper protection of the public interest, to mandate unitization, and to prescribe a plan which shall adequately protect the rights of all parties in interest, including the United States, and this authority may be exercised over the objections of working and royalty interest owners affected by that action. Having the authority to create, expand, or contract units and participating areas, the Secretary also has the concomitant authority to order such joinder as is necessary to implement that decision.

Under 30 U.S.C. § 226(j) (1982), as a condition precedent to establishing, expanding, or contracting a unit, the "reasonableness" of the proposal must be considered by the Department.

Chevron U.S.A. Inc., 111 IBLA 96 (Sept. 28, 1989)

ACQUIRED LANDS LEASES

A noncompetitive oil and gas lease offer for acquired lands may properly describe the requested lands by acquisition tract number assigned by the

ACQUIRED LANDS LEASES--Continued

acquiring agency, in accordance with 43 CFR 3111.2-2(c), where the land has not been surveyed under the rectangular system of public land surveys. Any additional description of the land which is correct and does not create ambiquity as to the land sought will not render the offer defective.

Bernard Silver, 107 IBLA 68 (Jan. 30, 1989)

ACREAGE LIMITATIONS

Under 43 CFR 3110.1-3(a), the minimum size for a noncompetitive oil and gas lease offer in Alaska is 2,560 acres or four full contiguous sections, whichever is larger, where the lands are within an approved protracted survey, unless the offer includes all available lands within the subject sections and there are no contiguous lands available for lease. An offer is properly rejected where it is established that the lands applied for, although comprising four full contiguous sections, together comprised less than 2,560 acres, and that contiguous lands were also available for leasing.

Eddeman Community Property Trust, 106 IBLA 376 (Jan. 19, 1989)

APPLICATIONS

Generally

Delay by the Bureau of Land Management in handling a noncompetitive oil and gas lease offer creates no right in the offeror to lease issuance on the terms which were available at the time the lease offer was made. When the land in a noncompetitive lease offer is included within a known geologic structure, the Secretary loses authority to lease except by competitive bid, and the noncompetitive offer must be rejected.

Eugen Dumitru Georgescu, 109 IBLA 317 (June 21, 1989)

OIL AND GAS LEASES--Continued

APPLICATIONS--Continued

Generally--Continued

43 CFR 3112.2-2 places all applicants on notice that the $75 application processing fee for noncompetitive lease offers made pursuant to simultaneous drawing will not be refunded. Where a portion of appellants' lease offer was properly rejected due to partial inclusion of the tract within a known geologic structure, BLM did not commit error in its refusal to refund appellants' $75 application processing fee.

John R. Stamper, BHP Petroleum (Americas), Inc., 110 IBLA 130 (Aug. 9, 1989)

Description

A noncompetitive oil and gas lease offer for acquired lands may properly describe the requested lands by acquisition tract number assigned by the acquiring agency, in accordance with 43 CFR 3111.2-2(c), where the land has not been surveyed under the rectangular system of public land surveys. Any additional description of the land which is correct and does not create ambiquity as to the land sought will not render the offer defective.

Bernard Silver, 107 IBLA 68 (Jan. 30, 1989)

Drawings

The regulation at 43 CFR 3112.5-1(b) (1987), prohibits any agreement, scheme, plan, or arrangement entered into prior to simultaneous oil and gas lease selection which gives any party more than a single opportunity of successfully obtaining a lease or interest therein. This regulation was not violated by filing an application bearing the name of an individual as applicant and listing 19 other parties in interest. In this case the filing service preparing the application customarily made the addresses of all parties in interest available to a lease broker, and prepared more than one application in this manner for the same parcel.

No violation of regulation 43 CFR 3102.1 (1987), limiting the holders of oil and gas leases to citizens of the United States, associations of such citizens,

OIL AND GAS LEASES--Continued

APPLICATIONS--Continued

Drawings--Continued

corporations, and municipalities, occurs upon the filing of an application bearing the name of a single individual as applicant and showing 19 names as other parties in interest when the 20 individuals are grouped at random by a filing service, which had entered into a service agreement with each individual.

Henrikas Brazaitis, 107 IBLA 56 (Jan. 30, 1989)

The regulation at 43 CFR 3112.5-1(b)(4) precludes a trustee filing a simultaneous oil and gas application for a single parcel on behalf of more than one entity with which he has a fiduciary relationship. Applications filed in violation of this prohibition are properly rejected.

Payne Family Trust, 107 IBLA 78 (Jan. 31, 1989)

A simultaneous oil and gas lease application is properly deemed unacceptable where, although the identification number on Parts A and B is the same, each part lists a different entity as the applicant.

Aleron H. Larson, Jr., 109 IBLA 185 (June 9, 1989)

Filing

The regulation at 43 CFR 3112.5-1(b) (1987), prohibits any agreement, scheme, plan, or arrangement entered into prior to simultaneous oil and gas lease selection which gives any party more than a single opportunity of successfully obtaining a lease or interest therein. This regulation was not violated by filing an application bearing the name of an individual as applicant and listing 19 other parties in interest. In this case the filing service preparing the application customarily made the addresses of all parties in interest available to a lease broker, and prepared more than one application in this manner for the same parcel.

No violation of regulation 43 CFR 3102.1 (1987), limiting the holders of oil and gas leases to citizens

APPLICATIONS--Continued

Filing--Continued

of the United States, associations of such citizens, corporations, and municipalities, occurs upon the filing of an application bearing the name of a single individual as applicant and showing 19 names as other parties in interest when the 20 individuals are grouped at random by a filing service, which had entered into a service agreement with each individual.

Henrikas Brazaitis, 107 IBLA 56 (Jan. 30, 1989)

Simultaneous

The Secretary of the Interior lacks authority under the Mineral Leasing Act to issue a noncompetitive oil and gas lease for lands found to be within a known geologic structure of a producing oil or gas field subsequent to filing of the lease offer and prior to lease issuance. A noncompetitive lease offer for such lands must be rejected notwithstanding the lands were not known to be in a known geologic structure at the time the offer was filed.

Edward F. Scholls, 109 IBLA 23 (May 25, 1989)

Sole Party in Interest

The regulation at 43 CFR 3112.5-1(b) (1987), prohibits any agreement, scheme, plan, or arrangement entered into prior to simultaneous oil and gas lease selection which gives any party more than a single opportunity of successfully obtaining a lease or interest therein. This regulation was not violated by filing an application bearing the name of an individual as applicant and listing 19 other parties in interest. In this case the filing service preparing the application customarily made the addresses of all parties in interest available to a lease broker, and prepared more than one application in this manner for the same parcel.

No violation of regulation 43 CFR 3102.1 (1987), limiting the holders of oil and gas leases to citizens of the United States, associations of such citizens, corporations, and municipalities, occurs upon the filing of an application bearing the name of a single

OIL AND GAS LEASES--Continued

APPLICATIONS--Continued

Sole Party in Interest--Continued

individual as applicant and showing 19 names as other parties in interest when the 20 individuals are grouped at random by a filing service, which had entered into a service agreement with each individual.

Henrikas Brazaitis, 107 IBLA 56 (Jan. 30, 1989)

2,560-acre Limitation

Under 43 CFR 3110.1-3(a), the minimum size for a noncompetitive oil and gas lease offer in Alaska is 2,560 acres or four full contiguous sections, whichever is larger, where the lands are within an approved protracted survey, unless the offer includes all available lands within the subject sections and there are no contiguous lands available for lease. An offer is properly rejected where it is established that the lands applied for, although comprising four full contiguous sections, together comprised less than 2,560 acres, and that contiguous lands were also available for leasing.

Eddeman Community Property Trust, 106 IBLA 376 (Jan. 19, 1989)

ASSIGNMENTS OR TRANSFERS

Where an underlying oil and gas lease offer has been previously rejected, and no appeal was taken, there is no longer any interest which can be assigned from the offeror, and a request for approval of an assignment from the offeror to another party is properly rejected.

Eddeman Community Property Trust, 106 IBLA 376 (Jan. 19, 1989)

OIL AND GAS LEASES--Continued

ASSIGNMENTS OR TRANSFERS--Continued

An essential element of a claim for estoppel is that the party asserting it must be ignorant of the true facts. Since, however, all persons are presumed to have knowledge of relevant statutory and regulatory provisions, estoppel will not lie when the legal consequences of an action are clearly set forth in statute and/or regulation.

Terra Resources, Inc., 107 IBLA 10 (Jan. 24, 1989)

A rental payment for an oil and gas lease sent to the wrong office does not constitute proper tender of rental. BLM is required to terminate an oil and gas lease for failure to pay rental timely, and properly looks to the lessee of record for such payment. The assignee of an oil and gas lease, however, may tender payment while approval of the assignment is pending.

Henry Y. Yoshino, 108 IBLA 47 (Mar. 21, 1989)

Application for approval by the Bureau of Land Management of an assignment of record title to an oil and gas lease is made by the assignee of the lease. An assignment filed in conformance with the applicable law and regulations ordinarily requires approval by the Department as to qualifications of the assignee and sufficiency of a bond.

A unilateral request by the assignor of an oil and gas lease for withdrawal of an unapproved assignment is properly regarded as a protest of the assignment and as an indication of a dispute between the parties to the assignment. Longstanding Departmental policy requires withholding action on the assignment until the dispute between the parties is resolved through agreement or litigation.

Ernhart, Inc., Thomas Hope, Jr., 108 IBLA 267 (Apr. 25, 1989)

OIL AND GAS LEASES--Continued

ASSIGNMENTS OR TRANSFERS--Continued

The assignee, upon approval of the assignment, becomes the lessee of the Government as to the assigned interest and is responsible for complying with all lease terms and conditions. The burden rests with the assignee to apprise himself of the lease terms and all rules, regulations, and law regarding the lease.

Nyle Edwards, 109 IBLA 72 (May 30, 1989)

Where the assignment of an oil and gas lease is pending before BLM, the assignor is responsible for the performance of all obligations under the lease until the assignment has been approved. The failure of BLM to approve an assignment by the rental due date does not excuse or justify the nonpayment or late payment of rental.

Cities Service Oil & Gas Corp., 109 IBLA 322 (June 21, 1989)

BONDS

Where no acceptable alternative bond has been filed, BLM properly refuses to terminate a surety's liability on an oil and gas lease bond bearing no expiration date, even though its principal has failed to satisfy the bond premium.

Fidelity & Deposit Co. of Maryland, 109 IBLA 389 (June 26, 1989)

BURDEN OF PROOF

The Department is entitled to rely on the reasoned analysis of its technical experts in matters within the realm of their expertise. If BLM supports a decision regarding the volume of gas avoidably lost by an operator with sufficient evidence to demonstrate a rational basis for that decision and that the decision was made in a careful and systematic manner, using the advice of such experts, the decision will not be rejected without a showing of error. The party challenging the decision has the burden of showing by

a preponderance of the evidence that the determination is erroneous.

Mallon Oil Co., 107 IBLA 150 (Feb. 10, 1989)

Delineation of a KGS recognizes the existence of a continuous entrapping structure, on some part of which there is production, or of numerous related, but nevertheless independent, stratigraphic or structural traps. A party challenging a determination that lands are within a KGS must either show that the producing structure does not underlie the land or affirmatively establish that the land involved is not productive from the structure in question. When the necessary showing is made, a BLM decision increasing the rental on the basis of the KGS determination will be reversed.

Osage Associates January 1983, 107 IBLA 233 (Feb. 21, 1989)

Delineation of a KGS recognizes the existence of a continuous entrapping structure, on some part of which there is production, or of numerous related, but nevertheless independent, stratigraphic or structural traps. A party challenging a determination that lands are within a KGS must either show that the producing structure does not underlie the land or affirmatively establish that the land involved is not productive from the structure in question. A determination by a Departmental technical expert that lands qualify for inclusion in a KGS will be upheld when it is not arbitrary and capricious and is supported by competent evidence.

Joy Goldschmidt, Jack J. Grynberg, 107 IBLA 237 (Feb. 21, 1989)

Delineation of a KGS recognizes the existence of a continuous entrapping structure, on some part of which there is production, or of numerous related, but nevertheless independent, stratigraphic or structural traps. A party challenging a determination that lands are within a KGS must either show that the producing structure does not underlie the land or affirmatively establish that the land involved is not productive

from the structure in question. A determination by a Departmental technical expert that lands qualify for inclusion in a KGS will be upheld when it is not arbitrary and capricious and is supported by competent evidence.

Paul E. Pendergrass, 108 IBLA 125 (Mar. 31, 1989)

Delineation of a KGS recognizes the existence of a continuous entrapping structure, on some part of which there is production, or of numerous related, but nevertheless independent, stratigraphic or structural traps. An appellant challenging a KGS determination must either show that the producing structure does not underlie the land or affirmatively establish that the structure in question is not productive in the land in question.

Petroport Corp., 109 IBLA 383 (June 26, 1989)

Where a dry hole adjacent to leased land is surrounded by producing wells and noncommercial producers exhibiting positive drill-stem tests for oil, a lessee's contention that a known geologic structure does not underlie his lease or that the structure in question is not productive is not proved.

Steven Gerald Kirkwood, 110 IBLA 363 (Sept. 14, 1989)

CANCELLATION

A decision to cancel an oil and gas lease on the basis of circumstances existing at the time of lease issuance will be reversed in the absence of a showing that the lease was issued without legal authority under relevant statute or regulation regardless of the existence of grounds which would have been sufficient to support an exercise of the Department's discretionary authority to reject a lease offer for the lands.

Joan Chorney, 108 IBLA 43 (Mar. 21, 1989)

OIL AND GAS LEASES--Continued

CANCELLATION--Continued

A decision to cancel an oil and gas lease will be affirmed on appeal to the extent it is shown that the lease was issued through administrative error for lands within a wilderness study area which the Department was barred by statute from leasing for oil and gas. The statutory protection afforded a bona fide purchaser of a lease under 30 U.S.C. § 184(h)(2) (1982), does not bar cancellation of a lease erroneously issued for lands which the Department was prohibited from leasing by act of Congress.

Joan Chorney (On Reconsideration), 109 IBLA 96 (June 5, 1989)

Where an oil and gas lease has inadvertently been issued for land that was the subject of an existing lease, the later lease is properly cancelled to the extent that it conflicts with the earlier lease.

Walter S. Fees, Jr., 110 IBLA 377 (Sept. 19, 1989)

CIVIL ASSESSMENTS AND PENALTIES

BLM may properly assess a designated operator $250 pursuant to 43 CFR 3163.3(a) (1986), for failure to comply, within a designated abatement period, with a written order to abide by stipulations governing abandonment of a lease well, regardless of whether the failure to comply might be attributable to a "de facto" operator of the well.

Celeste C. Grynberg (dba Grynberg Petroleum Co.), 106 IBLA 387 (Jan. 23, 1989)

Under 43 CFR 3163.1(b)(2) (1987), BLM shall impose an immediate assessment when an oil and gas lessee commences drilling or causes a surface disturbance preliminary thereto without obtaining prior BLM approval. The amount of the assessment, prescribed in the regulation, shall be $500 for each day that the violation exists, including the days the violation existed prior to discovery, not to exceed $5,000.

Noel Reynolds, 110 IBLA 74 (July 24, 1989)

OIL AND GAS LEASES--Continued

CIVIL ASSESSMENTS AND PENALTIES--Continued

Under 43 CFR 3162.5-1(c) and NTL 2-B, BLM may properly require the removal of all fluids discharged into a surface pit and may impose a civil assessment for failure to timely comply with an order to do so.

Conley P. Smith Oil Producer, 110 IBLA 92 (July 27, 1989)

COMMUNITIZATION AGREEMENTS

The lessee of a Federal oil and gas lease committed to a communitization agreement providing for the apportionment of production among the leases committed thereto is responsible for payment of royalty to MMS on the share of production allocated to his lease. The lessor's entitlement to a royalty on the allocated share of production from any lessee/operator producing and selling communitized substances from the unit will not diminish the responsibility of the lessee where the operator has defaulted on the royalty obligation.

Jerry Chambers Exploration Co., John M. Beard, 107 IBLA 161 (Feb. 10, 1989)

COMPENSATORY ROYALTY

Where land has been conveyed to the United States reserving to the grantors the exclusive right to prospect for and exploit the oil and gas underlying the land and that reservation has been extended beyond its initial term by production, in accordance with the terms of the deed, the United States has, during the extended term, no interest in any of that oil and gas sufficient to form the basis for claiming compensatory royalty because of drainage.

Doris Slaaten, 107 IBLA 16 (Jan. 25, 1989)

COMPENSATORY ROYALTY--Continued

A BLM decision requiring an oil and gas lessee to pay compensatory royalty for drainage resulting from an adjacent well will be set aside and the case remanded to BLM where BLM assessed royalty from the date of first production of the well, rather than from a reasonable time following notice to the lessee.

Chevron U.S.A. Inc., 107 IBLA 126 (Feb. 6, 1989)

The prudent operator rule limits the duty of a common lessee to protect Federal lands from drainage, i.e., a common lessee must pay compensatory royalty on oil and gas that it drained from a Federal lease only if the reserves recoverable by a protective well on the Federal lease are sufficient to pay a reasonable profit over and above the cost of drilling and operating the well.

Atlantic Richfield Co. (On Reconsideration), 110 IBLA 200 (Aug. 21, 1989) 96 I.D. 363

Where an unleased tract has been determined to be within a participating area pursuant to an approved unitization plan, revenues attributable to the tract held in escrow pursuant to the plan may not be used by BLM to secure a favorable bargain under competitive leasing requirements.

Coors Energy Co., 110 IBLA 250 (Sept. 11, 1989)

Compensatory royalties accrue after the passage of a reasonable time following the date the lessee knew or should have known that drainage was occurring. In a common lessee context, the lessee who drills the offending well is in the best position to know that drainage is occurring. In such case BLM need not assume the initial burden of showing that the lessee knew or that a reasonably prudent operator should have known that drainage was occurring, as the common lessee is presumed to have knowledge of the drainage upon first production from its offending well. This presumption is

OIL AND GAS LEASES--Continued

COMPENSATORY ROYALTY--Continued

rebuttable by the common lessee, who bears the ultimate burden of persuasion as to date he had notice that drainage was occurring.

Under the usual statement of the standard for prudent operation, the lessee is not obligated to drill an offset well unless there is a sufficient quantity of oil or gas to pay a reasonable profit to the lessee over and above the cost of drilling and operating the well. The prudent operator standard applies to situations in which a leased Federal tract is being drained by a well operated by a common lessee. In such cases, BLM has the burden of establishing that the leased Federal tract is being drained by the common lessee's non-Federal well, but need not prove as a part of its cause of action that a protective well would be economic. The burden of producing evidence and the ultimate burden of persuasion on this issue rest with the common lessee.

No breach of a lessee's duty to prevent drainage will occur if the cost of drilling and operating an offset well is greater than the value of the recovered oil and/or gas. However, if a lessee can make a reasonable profit by drilling the well, he has a duty to prevent drainage by either drilling a well or unitizing the drained area. The prudent operator test is applied looking to the reasonably anticipatable recovery from the offset well, rather than the oil and/or gas which would be lost if the well were not drilled.

Cordillera Corp., 111 IBLA 61 (Sept. 20, 1989)

COMPETITIVE LEASES

Under sec. 306 of the Act of Sept. 28, 1984 (the Utah Wilderness Act), Congress authorized BLM to issue leases for carbon dioxide gas in five areas within the Escalante KGS, subject to express restrictions on "exploration" and "development." Where BLM offers the areas for lease subject to a stipulation that fails adequately to enforce the statutory restrictions, and where BLM imposes this stipulation on only three of these five areas covered by sec. 306 of this Act, BLM's decision to receive bids on these areas will be

OIL AND GAS LEASES--Continued

COMPETITIVE LEASES--Continued

set aside and the case remanded for issuance of leases of the five areas without the stipulation.

BLM is not required to prepare an EIS at the lease issuance stage where it adopts a staged leasing program and determines that all post-lease development plans are subject to site-specific environmental review and that development might be limited or denied if such review discloses that unacceptable impacts on other land uses or resources would result. Accordingly, where BLM and the Forest Service nevertheless do prepare an EIS announcing that proposals for actual development of the leases will be subject to further environmental analysis, the Board will not interfere with a decision based on the EIS because of alleged inadequacies therein.

Southern Utah Wilderness Alliance et al., 108 IBLA 318 (Apr. 28, 1989)

Where an unleased tract has been determined to be within a participating area pursuant to an approved unitization plan, revenues attributable to the tract held in escrow pursuant to the plan may not be used by BLM to secure a favorable bargain under competitive leasing requirements.

Coors Energy Co., 110 IBLA 250 (Sept. 11, 1989)

Disagreement with BLM's interpretation of relevant geology is insufficient to establish error in a BLM decision to reject a high bid for an oil and gas lease. Such a decision will be affirmed on appeal where error in the decision is not shown and it is not proved that the rejected bid represents fair market value.

Maralo Inc., 110 IBLA 266 (Sept. 12, 1989)

OIL AND GAS LEASES--Continued

COMPETITIVE LEASES--Continued

An amended regulation governing payment of the cost of publishing the notice of a competitive oil and gas lease sale may be applied to a pending matter where, absent intervening rights or countervailing public policy reasons, the amended regulation will benefit the affected party.

Alvin L. Terry, Jr., 110 IBLA 360 (Sept. 14, 1989)

DESCRIPTION OF LAND

A noncompetitive oil and gas lease offer for acquired lands may properly describe the requested lands by acquisition tract number assigned by the acquiring agency, in accordance with 43 CFR 3111.2-2(c), where the land has not been surveyed under the rectangular system of public land surveys. Any additional description of the land which is correct and does not create ambiquity as to the land sought will not render the offer defective.

Bernard Silver, 107 IBLA 68 (Jan. 30, 1989)

DISCRETION TO LEASE

Disagreement with BLM's interpretation of relevant geology is insufficient to establish error in a BLM decision to reject a high bid for an oil and gas lease. Such a decision will be affirmed on appeal where error in the decision is not shown and it is not proved that the rejected bid represents fair market value.

Maralo Inc., 110 IBLA 266 (Sept. 12, 1989)

DRAINAGE

A BLM decision requiring an oil and gas lessee to pay compensatory royalty for drainage resulting from an adjacent well will be set aside and the case remanded to BLM where BLM assessed royalty from the

date of first production of the well, rather than from a reasonable time following notice to the lessee.

Chevron U.S.A. Inc., 107 IBLA 126 (Feb. 6, 1989)

The prudent operator rule limits the duty of a common lessee to protect Federal lands from drainage, i.e., a common lessee must pay compensatory royalty on oil and gas that it drained from a Federal lease only if the reserves recoverable by a protective well on the Federal lease are sufficient to pay a reasonable profit over and above the cost of drilling and operating the well.

Atlantic Richfield Co. (On Reconsideration), 110 IBLA 200 (Aug. 21, 1989) 96 I.D. 363

Where an unleased tract has been determined to be within a participating area pursuant to an approved unitization plan, revenues attributable to the tract held in escrow pursuant to the plan may not be used by BLM to secure a favorable bargain under competitive leasing requirements.

Unleased Federal lands determined to be productive in paying quantities as part of a unitization plan may not be considered "unitized" to protect the uncommitted land from drainage.

Coors Energy Co., 110 IBLA 250 (Sept. 11, 1989)

Compensatory royalties accrue after the passage of a reasonable time following the date the lessee knew or should have known that drainage was occurring. In a common lessee context, the lessee who drills the offending well is in the best position to know that drainage is occurring. In such case BLM need not assume the initial burden of showing that the lessee knew or that a reasonably prudent operator should have known that drainage was occurring, as the common lessee is presumed to have knowledge of the drainage upon first

production from its offending well. This presumption is rebuttable by the common lessee, who bears the ultimate burden of persuasion as to date he had notice that drainage was occurring.

Under the usual statement of the standard for prudent operation, the lessee is not obligated to drill an offset well unless there is a sufficient quantity of oil or gas to pay a reasonable profit to the lessee over and above the cost of drilling and operating the well. The prudent operator standard applies to situations in which a leased Federal tract is being drained by a well operated by a common lessee. In such cases, BLM has the burden of establishing that the leased Federal tract is being drained by the common lessee's non-Federal well, but need not prove as a part of its cause of action that a protective well would be economic. The burden of producing evidence and the ultimate burden of persuasion on this issue rest with the common lessee.

No breach of a lessee's duty to prevent drainage will occur if the cost of drilling and operating an offset well is greater than the value of the recovered oil and/or gas. However, if a lessee can make a reasonable profit by drilling the well, he has a duty to prevent drainage by either drilling a well or unitizing the drained area. The prudent operator test is applied looking to the reasonably anticipatable recovery from the offset well, rather than the oil and/or gas which would be lost if the well were not drilled.

Cordillera Corp., 111 IBLA 61 (Sept. 20, 1989)

DRILLING

A BLM decision approving an application for a permit to drill within a designated resource protection zone surrounding units of the Hovenweep National Monument will be reversed where, in the course of its assessment of the environmental impact of proposed drilling and associated road improvement activity, BLM failed to consider the potential cumulative impact of such activity in conjunction with other existing and

OIL AND GAS LEASES--Continued

DRILLING--Continued

proposed drilling and production of wells and associated road improvement activity within the protection zone.

Colorado Environmental Coalition et al., 108 IBLA 10 (Mar. 20, 1989)

The categorical exclusion found at 516 DM 6, Appendix 5.4D(2)(d), exempting APD approval from the NEPA process, applies only to exploratory wells and not to development wells.

Where an environmental assessment prepared for consideration of an APD is deficient in its discussion of possible effects of the proposed action on wildlife, fails to discuss relevant mitigation measures, and does not document the reasons why it rejects various alternatives to the proposed action, approval of the APD based on such an environmental assessment must be set aside.

Under the decision of the Court of Appeals for the Tenth Circuit in Park County Resource Council, Inc. v. United States Department of Agriculture, 817 F.2d 609 (1987), where an initial exploratory well has been successfully drilled and a lessee files an APD for additional development wells, the filing of the APD triggers the requirement for an Environmental Impact Statement, unless an Environmental Impact Statement has already been prepared which analyzes the impacts that can be expected from full field development.

Michael Gold et al., 108 IBLA 231 (Apr. 24, 1989)

This Board will affirm a BLM decision consenting to directional drilling of an oil and gas well spudded on state lands, drilled through lands described in a Federal lease, and bottomed on private lands when there is a showing that the consent is conditioned upon taking steps to prevent unnecessary or unreasonable interference with the right of the Federal lessee.

M. J. Harvey, Jr., 109 IBLA 31 (May 25, 1989)

OIL AND GAS LEASES--Continued

EXPIRATION

An essential element of a claim for estoppel is that the party asserting it must be ignorant of the true facts. Since, however, all persons are presumed to have knowledge of relevant statutory and regulatory provisions, estoppel will not lie when the legal consequences of an action are clearly set forth in statute and/or regulation.

Terra Resources, Inc., 107 IBLA 10 (Jan. 24, 1989)

EXTENSIONS

An essential element of a claim for estoppel is that the party asserting it must be ignorant of the true facts. Since, however, all persons are presumed to have knowledge of relevant statutory and regulatory provisions, estoppel will not lie when the legal consequences of an action are clearly set forth in statute and/or regulation.

Terra Resources, Inc., 107 IBLA 10 (Jan. 24, 1989)

FUTURE AND FRACTIONAL INTEREST LEASES

A decision to reject an offer for a future interest oil and gas lease on the basis of a conflicting future interest lease may be set aside where the offer was accompanied by evidence of the offeror's title to the present operating rights as required by regulation at 43 CFR 3111.3-2 (1987), which evidence included a release executed by the conflicting lessee as required by the terms of the supplemental agreement to the future interest lease.

Alamo Exploration Co., 108 IBLA 262 (Apr. 25, 1989)

An oil and gas lease offer for acquired land located in the State of Michigan, which was filed on Oct. 18, 1985, is properly rejected due to premature filing where, in a warranty deed dated Oct. 18, 1935, passing title to the surface estate to the United States, the minerals were reserved in the grantor "until Fifty (50) years from date of this instrument," since the minerals did not vest in the United States until Oct. 19, 1985, according to the general rule

FUTURE AND FRACTIONAL INTEREST LEASES--Continued

applicable in Michigan, that when computing the time within which an action is to take place, the first day is excluded and the last day included.

Wilfred Plomis, 110 IBLA 11 (July 5, 1989)

INCIDENTS OF NONCOMPLIANCE

BLM may properly assess a designated operator $250 pursuant to 43 CFR 3163.3(a) (1986), for failure to comply, within a designated abatement period, with a written order to abide by stipulations governing abandonment of a lease well, regardless of whether the failure to comply might be attributable to a "de facto" operator of the well.

Celeste C. Grynberg (dba Grynberg Petroleum Co.), 106 IBLA 387 (Jan. 23, 1989)

Under 43 CFR 3162.5-1(c) and NTL 2-B, BLM may properly require the removal of all fluids discharged into a surface pit and may impose a civil assessment for failure to timely comply with an order to do so.

Conley P. Smith Oil Producer, 110 IBLA 92 (July 27, 1989)

KNOWN GEOLOGIC STRUCTURE

Pursuant to 43 CFR 3103.2-2(d), BLM may properly require the holder of a noncompetitive oil and gas lease to pay an increased rental where, during the lease term, any part of the leased land is included within a known geologic structure.

A determination that lands are within a known geologic structure of a producing oil or gas field, based in part on aeromagnetic data, will not be disturbed absent a showing of error by a preponderance of the evidence.

Jack J. Grynberg, 106 IBLA 367 (Jan. 13, 1989)

KNOWN GEOLOGIC STRUCTURE--Continued

A BLM determination that lands are within a known geologic structure of a producing oil and gas field will be sustained on appeal where the record shows that these lands are underlain by a formation determined to be productive elsewhere in the area, and where appellant fails to establish by a preponderance of the evidence that the designation is in error.

BLM does not properly include land within the known geologic structure of a producing oil or gas field where the land does not constitute the smallest legal subdivision crossed by the productive limits of an entrapping structure but is included merely because it falls within a 640-acre state spacing unit.

Patricia A. Laudon, 107 IBLA 26 (Jan. 25, 1989)

Where appellant's lease contains provision for increase of rental rate upon reclassification of her leasehold, or any part thereof, within a known geologic structure, both lessor and lessee are bound by the terms of the lease.

A holder of a noncompetitive oil and gas lease who challenges a determination that certain lands are within the known geologic structure of a producing oil or gas field has the burden of establishing that the determination is in error. Where the record establishes that the Secretary's technical expert has made a reasoned analysis of the available geological data, the Secretary is entitled to rely upon his expert's professional opinion, absent a showing of error by a preponderance of the evidence.

Celeste C. Grynberg, 107 IBLA 143 (Feb. 7, 1989)

Under 30 U.S.C. § 226(b) (1982), public domain lands within the KGS of a producing oil and gas field shall be leased to the highest responsible qualified bidder by competitive bidding. The Department has no discretion to issue noncompetitive leases for KGS lands. Therefore, if the lands described in a noncompetitive lease offer for those lands must be rejected.

A KGS, as defined by 43 CFR 3100.0-5(l), is technically the trap in which an accumulation of oil

OIL AND GAS LEASES--Continued

KNOWN GEOLOGIC STRUCTURE--Continued

and gas has been discovered by drilling and determined to be productive, the limits of which include all acreage that is presumptively productive.

A person challenging a Departmental determination that lands are within a KGS has the burden of showing by a preponderance of the evidence that the determination is in error. To establish the preponderance of the evidence means to prove that something is more likely so than not; in other words, "the preponderance of the evidence" means such evidence, when considered and compared with the opposite to it, has more convincing force and produces in your mind's belief that what is sought to be proved is more likely to be true than not.

The Secretary of the Interior has traditionally delegated the responsibility for determining the existence and extent of a KGS to his technical experts in the field. When a technical expert makes a determination that lands qualify for inclusion in a KGS, the Secretary is entitled to rely upon his reasoning. On the other hand, the determination of whether the lands are properly included in a KGS is largely dependent upon factual interpretation, and when there is a material issue of fact determinative of the issues posed, this Board has the discretionary authority to order a hearing on the matter before an Admininstrative Law Judge pursuant to 43 CFR 4.415.

Harry Ptasynski, 107 IBLA 197 (Feb. 15, 1989)

Delineation of a KGS recognizes the existence of a continuous entrapping structure, on some part of which there is production, or of numerous related, but nevertheless independent, stratigraphic or structural traps. A party challenging a determination that lands are within a KGS must either show that the producing structure does not underlie the land or affirmatively establish that the land involved is not productive from the structure in question. When the necessary showing is made, a BLM decision increasing the rental on the basis of the KGS determination will be reversed.

Osage Associates January 1983, 107 IBLA 233 (Feb. 21, 1989)

OIL AND GAS LEASES--Continued

KNOWN GEOLOGIC STRUCTURE--Continued

Delineation of a KGS recognizes the existence of a continuous entrapping structure, on some part of which there is production, or of numerous related, but nevertheless independent, stratigraphic or structural traps. A party challenging a determination that lands are within a KGS must either show that the producing structure does not underlie the land or affirmatively establish that the land involved is not productive from the structure in question. A determination by a Departmental technical expert that lands qualify for inclusion in a KGS will be upheld when it is not arbitrary and capricious and is supported by competent evidence.

The fact that the boundaries for this portion of the KGS were established based upon data from a limited number of wells does not mean that BLM erred in relying upon the information. Regardless of whether the available information is sparse or abundant, when a KGS determination is challenged, the relevant questions concern the reasonableness of the inferences which have been made based upon the data and the extent to which BLM's conclusions concerning the geologic structure are supported or contradicted by the available data.

The determination that land is within a KGS does not guarantee that the entire area is productive; it only shows that on the basis of geological evidence the Department has determined there is a structure in which oil or gas is trapped and there is production from a well on that structure. So long as there is production, BLM is not restricted as to which formation it may select as the basis for defining a KGS.

Land is included in the KGS on the basis of geologic evidence indicating that the structure underlies the land, not on the basis of evidence that oil and gas is contained in that portion of the structure which underlies the land. Consequently, the fact that land within the KGS is later found not to be productive does not mean that it was improperly included or that the criteria for its inclusion were deficient.

Joy Goldschmidt, Jack J. Grynberg, 107 IBLA 237 (Feb. 21, 1989)

KNOWN GEOLOGIC STRUCTURE--Continued

Delineation of a KGS recognizes the existence of a continuous entrapping structure, on some part of which there is production, or of numerous related, but nevertheless independent, stratigraphic or structural traps. A party challenging a determination that lands are within a KGS must either show that the producing structure does not underlie the land or affirmatively establish that the land involved is not productive from the structure in question. A determination by a Departmental technical expert that lands qualify for inclusion in a KGS will be upheld when it is not arbitrary and capricious and is supported by competent evidence.

The fact that the boundary of a portion of a KGS is established based upon data from a limited number of wells does not mean that BLM errs in relying upon the information. When a KGS determination is challenged, the relevant questions concern the reasonableness of the inferences which have been made based upon well data and the extent to which BLM's conclusions concerning the geologic structure are supported or contradicted by the available information.

The determination that land is within a KGS does not guarantee that it will be productive; it means only that, on the basis of geological evidence, the Department has determined there is a structure in which oil or gas is trapped and there is production from a well on that structure. Land is included in the KGS when the geologic evidence indicates that the structure underlies the land, not on the basis of evidence that oil and gas is contained in the portion of the structure under the land.

Paul E. Pendergrass, 108 IBLA 125 (Mar. 31, 1989)

A regulation requiring an increased rental rate of $2 per acre for reinstated leases found to be within a KGS which was not in effect at the time a lease was reinstated does not become a provision of the reinstated lease and does not apply to the lease.

Dyco Petroleum Corp., 108 IBLA 366 (May 16, 1989)

OIL AND GAS LEASES--Continued

KNOWN GEOLOGIC STRUCTURE--Continued

The Secretary of the Interior lacks authority under the Mineral Leasing Act to issue a noncompetitive oil and gas lease for lands found to be within a known geologic structure of a producing oil or gas field subsequent to filing of the lease offer and prior to lease issuance. A noncompetitive lease offer for such lands must be rejected notwithstanding the lands were not known to be in a known geologic structure at the time the offer was filed.

A determination that lands are within a known geologic structure of a producing oil or gas field will be sustained on appeal where the record shows lands are underlain by a formation determined to be productive elsewhere in the area, and where appellant fails to establish by a preponderance of the evidence that the designation is in error.

Edward F. Scholls, 109 IBLA 23 (May 25, 1989)

Delay by the Bureau of Land Management in handling a noncompetitive oil and gas lease offer creates no right in the offeror to lease issuance on the terms which were available at the time the lease offer was made. When the land in a noncompetitive lease offer is included within a known geologic structure, the Secretary loses authority to lease except by competitive bid, and the noncompetitive offer must be rejected.

Eugen Dumitru Georgescu, 109 IBLA 317 (June 21, 1989)

Delineation of a KGS recognizes the existence of a continuous entrapping structure, on some part of which there is production, or of numerous related, but nevertheless independent, stratigraphic or structural traps. An appellant challenging a KGS determination must either show that the producing structure does not underlie the land or affirmatively establish that the structure in question is not productive in the land in question.

Petroport Corp., 109 IBLA 383 (June 26, 1989)

OIL AND GAS LEASES--Continued

KNOWN GEOLOGIC STRUCTURE--Continued

The Board will sustain a BLM decision rejecting a noncompetitive oil and gas lease offer for land situated within the known geologic structure of a producing gas field where the offeror fails to establish by a preponderance of the evidence that the land is not properly considered presumptively productive of gas.

Ricky J. Calhoon, 110 IBLA 112 (Aug. 4, 1989)

A holder of a noncompetitive oil and gas lease who challenges a determination that certain lands are within the known geologic structure of a producing oil or gas field has the burden of establishing that the determination is in error. Where the record establishes that the Secretary's technical expert has made a reasoned analysis of the available geological data, the Secretary is entitled to rely upon his expert's professional opinion, absent a showing of error by a preponderance of the evidence.

John R. Stamper, BHP Petroleum (Americas), Inc., 110 IBLA 130 (Aug. 9, 1989)

Lands within a known geologic structure of a producing oil or gas field may be leased only after competitive bidding under the provisions of 30 U.S.C. § 226(b) (1982). Where lands are determined to be within such a structure before issuance of a lease, the noncompetitive lease application for such lands must be rejected.

An applicant for a noncompetitive oil and gas lease who challenges a determination that certain lands are within the known geologic structure of a producing oil or gas field has the burden of showing by a preponderance of the evidence that the determination is in error.

B. A. Wilford, 110 IBLA 154 (Aug. 11, 1989)

OIL AND GAS LEASES--Continued

KNOWN GEOLOGIC STRUCTURE--Continued

Where a dry hole adjacent to leased land is surrounded by producing wells and noncommercial producers exhibiting positive drill-stem tests for oil, a lessee's contention that a known geologic structure does not underlie his lease or that the structure in question is not productive is not proved.

Steven Gerald Kirkwood, 110 IBLA 363 (Sept. 14, 1989)

LANDS SUBJECT TO

A decision to cancel an oil and gas lease on the basis of circumstances existing at the time of lease issuance will be reversed in the absence of a showing that the lease was issued without legal authority under relevant statute or regulation regardless of the existence of grounds which would have been sufficient to support an exercise of the Department's discretionary authority to reject a lease offer for the lands.

Joan Chorney, 108 IBLA 43 (Mar. 21, 1989)

A decision to cancel an oil and gas lease will be affirmed on appeal to the extent it is shown that the lease was issued through administrative error for lands within a wilderness study area which the Department was barred by statute from leasing for oil and gas. The statutory protection afforded a bona fide purchaser of a lease under 30 U.S.C. § 184(h)(2) (1982), does not bar cancellation of a lease erroneously issued for lands which the Department was prohibited from leasing by act of Congress.

Joan Chorney (On Reconsideration), 109 IBLA 96 (June 5, 1989)

An oil and gas lease offer for acquired land located in the State of Michigan, which was filed on Oct. 18, 1985, is properly rejected due to premature filing where, in a warranty deed dated Oct. 18, 1935, passing title to the surface estate to the United States, the minerals were reserved in the grantor "until Fifty (50) years from date of this instrument," since the minerals did not vest in the United States until Oct. 19, 1985, according to the general rule

LANDS SUBJECT TO--Continued

applicable in Michigan, that when computing the time within which an action is to take place, the first day is excluded and the last day included.

Wilfred Plomis, 110 IBLA 11 (July 5, 1989)

NONCOMPETITIVE LEASES

A holder of a noncompetitive oil and gas lease who challenges a determination that certain lands are within the known geologic structure of a producing oil or gas field has the burden of establishing that the determination is in error. Where the record establishes that the Secretary's technical expert has made a reasoned analysis of the available geological data, the Secretary is entitled to rely upon his expert's professional opinion, absent a showing of error by a preponderance of the evidence.

Celeste C. Grynberg, 107 IBLA 143 (Feb. 7, 1989)

Under 30 U.S.C. § 226(b) (1982), public domain lands within the KGS of a producing oil and gas field shall be leased to the highest responsible qualified bidder by competitive bidding. The Department has no discretion to issue noncompetitive leases for KGS lands. Therefore, if the lands described in a noncompetitive lease offer for those lands must be rejected.

A KGS, as defined by 43 CFR 3100.0-5(l), is technically the trap in which an accumulation of oil and gas has been discovered by drilling and determined to be productive, the limits of which include all acreage that is presumptively productive.

Harry Ptasynski, 107 IBLA 197 (Feb. 15, 1989)

OIL AND GAS LEASES--Continued

NONCOMPETITIVE LEASES--Continued

The Secretary of the Interior lacks authority under the Mineral Leasing Act to issue a noncompetitive oil and gas lease for lands found to be within a known geologic structure of a producing oil or gas field subsequent to filing of the lease offer and prior to lease issuance. A noncompetitive lease offer for such lands must be rejected notwithstanding the lands were not known to be in a known geologic structure at the time the offer was filed.

Edward F. Scholls, 109 IBLA 23 (May 25, 1989)

Delay by the Bureau of Land Management in handling a noncompetitive oil and gas lease offer creates no right in the offeror to lease issuance on the terms which were available at the time the lease offer was made. When the land in a noncompetitive lease offer is included within a known geologic structure, the Secretary loses authority to lease except by competitive bid, and the noncompetitive offer must be rejected.

Eugen Dumitru Georgescu, 109 IBLA 317 (June 21, 1989)

An oil and gas lease offer for acquired land located in the State of Michigan, which was filed on Oct. 18, 1985, is properly rejected due to premature filing where, in a warranty deed dated Oct. 18, 1935, passing title to the surface estate to the United States, the minerals were reserved in the grantor "until Fifty (50) years from date of this instrument," since the minerals did not vest in the United States until Oct. 19, 1985, according to the general rule applicable in Michigan, that when computing the time within which an action is to take place, the first day is excluded and the last day included.

Wilfred Plomis, 110 IBLA 11 (July 5, 1989)

OIL AND GAS LEASES--Continued

NONCOMPETITIVE LEASES--Continued

A holder of a noncompetitive oil and gas lease who challenges a determination that certain lands are within the known geologic structure of a producing oil or gas field has the burden of establishing that the determination is in error. Where the record establishes that the Secretary's technical expert has made a reasoned analysis of the available geological data, the Secretary is entitled to rely upon his expert's professional opinion, absent a showing of error by a preponderance of the evidence.

John R. Stamper, BHP Petroleum (Americas), Inc., 110 IBLA 130 (Aug. 9, 1989)

Lands within a known geologic structure of a producing oil or gas field may be leased only after competitive bidding under the provisions of 30 U.S.C. § 226(b) (1982). Where lands are determined to be within such a structure before issuance of a lease, the noncompetitive lease application for such lands must be rejected.

An applicant for a noncompetitive oil and gas lease who challenges a determination that certain lands are within the known geologic structure of a producing oil or gas field has the burden of showing by a preponderance of the evidence that the determination is in error.

B. A. Wilford, 110 IBLA 154 (Aug. 11, 1989)

OFFERS TO LEASE

BLM properly rejects a telecopy of a lease offer because it does not bear a personal handwritten signature as required by 43 CFR 3112.6-1(a) and 3102.4.

Reed Gilmore (On Reconsideration), 107 IBLA 37 (Jan. 26, 1989)

OIL AND GAS LEASES--Continued

OFFERS TO LEASE--Continued

Oil and gas offers to lease were properly rejected by BLM pursuant to 1976 Federal Coal Leasing Amendments Act amendments to the Mineral Leasing Act, 30 U.S.C. § 201(a)(2)(A) (1982), requiring that a lessee who has held a Federal coal lease for a period of 10 years must be producing coal in commercial quantities in order to qualify for other Federal leases under the Mineral Leasing Act, where oil and gas offers to lease were made, and offeror could not show that production was occurring in commercial quantities from a readjusted coal lease held by offeror for a period of more than 10 years.

GeoResources, Inc., 107 IBLA 311 (Mar. 2, 1989) 96 I.D. 77

The Board will sustain a BLM decision rejecting a noncompetitive oil and gas lease offer for land situated within the known geologic structure of a producing gas field where the offeror fails to establish by a preponderance of the evidence that the land is not properly considered presumptively productive of gas.

Ricky J. Calhoon, 110 IBLA 112 (Aug. 4, 1989)

REINSTATEMENT

Under 30 U.S.C. § 188(c)(1982), BLM has no authority to reinstate a noncompetitive oil and gas lease terminated by operation of law for failure to pay annual rental timely unless the full amount of the rental due is submitted within 20 days after the anniversary date and other requirements are met.

Kiyoshi Matsuno, 107 IBLA 261 (Feb. 22, 1989)

Under 30 U.S.C. § 188(c) (1982), the so-called "class I" reinstatement authority, BLM has no authority to reinstate a noncompetitive oil and gas lease terminated by operation of law for failure to pay annual rental timely unless the full amount of the rental due is submitted within 20 days after the anniversary date and other requirements are met. This restriction

applies regardless of the circumstances surrounding the failure to submit the rental timely.

If an oil and gas lease has terminated by operation of law for failure to make timely payment of the annual rental, it may be reinstated pursuant to the provisions of 30 U.S.C. § 188(d) (1982), provided that the failure to pay on time was "inadvertent," and the other requirements are met. A failure to timely submit rental is properly deemed not to be inadvertent only when it is the result of an intentional and knowing choice of the lessee or the lessee lacked the resources to pay the rental. If the lessee has evidently attempted to pay rental, but failed because his payment was lost in the mail, the failure was inadvertent.

Mark Salisbury, 107 IBLA 335 (Mar. 15, 1989)

Reinstatement of a terminated oil and gas lease pursuant to 30 U.S.C. § 188(c) (1982), requires a showing by the lessee that the late rental payment was either justifiable or not due to a lack of reasonable diligence. Mailing the rental payment after the due date is not reasonable diligence. The complexity of the lessee's business affairs will not justify a late payment.

BLM's cashing a late rental check and depositing it in an unearned account does not constitute acceptance of rental payment or a determination that a terminated oil and gas lease will be reinstated.

Clarence Souser, 108 IBLA 59 (Mar. 22, 1989)

BLM may, in accordance with 43 CFR 3108.2-3(f), reduce the royalty rate for a reinstated lease in three separate circumstances: (1) where it finds undue hardship or premature termination of production would result; (2) where a lessee has expended funds to develop the lease, after the rental was due and not paid, on the basis of any written action of the United States, its agents or employees, which preceded the

OIL AND GAS LEASES--Continued

REINSTATEMENT--Continued

expenditure of those funds and was a major consideration in their expenditure; or (3) where it finds it is equitable to do so for any other reason.

Where an oil and gas lessee requests, in accordance with 30 U.S.C. § 188(i)(2) (1982), and 43 CFR 3108.2-3(f), reduction of the increased royalty rate upon reinstatement of its lease on the basis that a written action by BLM preceded and was a major consideration in its expenditure of funds to develop the lands covered by the lease after the rental became due and was not paid, that request is properly denied when the record shows that although the lessee received a letter from BLM after the anniversary date of the lease, that letter did not precede and was not a major consideration in the lessee's expenditure of funds to develop the lands covered by the lease.

Mallon Oil Co., et al., 108 IBLA 241 (Apr. 24, 1989)

A regulation requiring an increased rental rate of $2 per acre for reinstated leases found to be within a KGS which was not in effect at the time a lease was reinstated does not become a provision of the reinstated lease and does not apply to the lease.

Dyco Petroleum Corp., 108 IBLA 366 (May 16, 1989)

Reinstatement of a terminated oil and gas lease pursuant to 30 U.S.C. § 188(c) (1982), requires a showing by the lessee that the late rental payment was either justifiable or not due to a lack of reasonable diligence. Mailing the rental payment after the due date is not reasonable diligence.

Nyle Edwards, 109 IBLA 72 (May 30, 1989)

OIL AND GAS LEASES--Continued

REINSTATEMENT--Continued

Pursuant to 30 U.S.C. § 188(b) (1982), when a lessee fails to pay the required rental on or before the anniversary date of the lease, and the lease has no well capable of producing oil or gas in paying quantities, the lease shall automatically terminate by operation of law. The Secretary may reinstate the lease, pursuant to 30 U.S.C. § 188(c) (1982), if the full rental is paid within 20 days of the lease anniversary date, and the failure to timely pay was justifiable or not due to a lack of reasonable diligence. Mailing the rental payment after the lease anniversary date does not constitute reasonable diligence.

Under procedures for class I reinstatement, 30 U.S.C. § 188(c) (1982), failure to exercise reasonable diligence in paying the rental for an oil and gas lease may be considered justifiable if it is demonstrated that, at or near the anniversary date, there existed sufficiently extenuating circumstances outside of the lessee's control which affected her actions in failing to make timely payment. Mere negligence, forgetfulness, and inadvertence of the lessee in effecting rental timely are not sufficient to warrant class I reinstatement.

Nancy Houston, 109 IBLA 79 (May 31, 1989)

Pursuant to 30 U.S.C. § 188(b) (1982), when a lessee fails to pay the required rental on or before the anniversary date of the lease, on which there is no well capable of producing oil or gas in paying quantities, the lease shall automatically terminate by operation of law. The Secretary may reinstate the lease, pursuant to 30 U.S.C. § 188(c) (1982), if the full rental is paid within 20 days of the lease anniversary date, and failure to timely pay was justifiable or not due to a lack of reasonable diligence. Mailing the rental payment after the lease anniversary date does not constitute reasonable diligence.

In petitioning for class I reinstatement of an oil and gas lease under 30 U.S.C. § 188(c) (1982), failure to exercise reasonable diligence in paying the rental may be considered justifiable if it is demonstrated that, at or near the anniversary date of the lease, there existed sufficiently extenuating circumstances outside the lessee's control which affected his actions in failing to make timely payment. Neither the fact

OIL AND GAS LEASES--Continued

REINSTATEMENT--Continued

that the lessee forgot to make the payment nor the fact that he was preoccupied with business matters will justify a late rental payment.

George Foster, 109 IBLA 82 (May 31, 1989)

Pursuant to 30 U.S.C. § 188(b) (1982), when a lessee fails to pay the required rental on or before the anniversary date of the lease, on which there is no well capable of producing oil or gas in paying quantities, the lease shall automatically terminate by operation of law. The Secretary may reinstate the lease, pursuant to 30 U.S.C. § 188(c) (1982), if the full rental is paid within 20 days of the lease anniversary date, and the failure to timely pay was justifiable or not due to a lack of reasonable diligence. Mailing the rental payment on the date it is due will not establish reasonable diligence in the absence of a postmark on or before the lease anniversary date (or if the office is closed on the anniversary date, the next day the office is open) as required by the regulation at 43 CFR 3108.2-2(a), 53 FR 17357 (May 16, 1988).

Seth & Alice Swift, 109 IBLA 270 (June 16, 1989)

Under 30 U.S.C. § 188(c) (1982), the class I reinstatement authority, BLM has no authority to reinstate a noncompetitive oil and gas lease terminated by operation of law for failure to pay annual rental timely unless the full amount of the rental due is submitted within 30 days after the anniversary date and other requirements are met. This restriction applies regardless of the circumstances surrounding the failure to submit the rental timely.

Cities Service Oil & Gas Corp., 109 IBLA 322 (June 21, 1989)

RENTALS

Pursuant to 43 CFR 3103.2-2(d), BLM may properly require the holder of a noncompetitive oil and gas lease to pay an increased rental where, during the lease term, any part of the leased land is included within a known geologic structure.

A determination that lands are within a known geologic structure of a producing oil or gas field, based in part on aeromagnetic data, will not be disturbed absent a showing of error by a preponderance of the evidence.

Jack J. Grynberg, 106 IBLA 367 (Jan. 13, 1989)

Where appellant's lease contains provision for increase of rental rate upon reclassification of her leasehold, or any part thereof, within a known geologic structure, both lessor and lessee are bound by the terms of the lease.

Celeste C. Grynberg, 107 IBLA 143 (Feb. 7, 1989)

The requirement set forth in a unit agreement to pay rental with respect to the nonparticipating acreage of unitized Outer Continental Shelf oil and gas leases but to pay minimum royalty with respect to the participating acreage does not effect a de facto segregation of such leases which would not be permitted in the absence of express statutory authorization.

The Minerals Management Service properly denies a request for a refund of rental paid with respect to the nonparticipating acreage of unitized Outer Continental Shelf oil and gas leases where the unit agreement properly requires such payment consistent with the Outer Continental Shelf Lands Act, as amended, 43 U.S.C. §§ 1331-1356 (1982).

Shell Offshore Inc., 107 IBLA 165 (Feb. 13, 1989)

RENTALS--Continued

It is the lessee's responsibility to see that any payment tendered for annual rental on an oil and gas lease is so identified that the appropriate State Office can credit that payment to the proper lease account. When both the official assignment creating a new lease and the notice informing the assignee that the assignment has been approved contain the correct serial number, the new lease terminates by operation of law for failure to pay rental on or before the anniversary date of the lease when the assignor, in tendering annual rental, provides the base lease serial number but fails to identify the new lease by its serial number. BLM properly deems the amount in excess of the payment due on the base lease to be an overpayment on the base lease to be returned to the assignor.

James A. Lynch, Jr., 107 IBLA 253 (Feb. 22, 1989)

Walter T. Clark, Jr., 107 IBLA 257 (Feb. 22, 1989)

It is the responsibility of a lessee to see that any payment tendered for annual rental on an oil and gas lease is so identified that the appropriate State Office can credit that payment to the proper lease account. When both the official assignment creating the lease and the notice informing the assignee that the assignment has been approved contains the correct serial number, but the lessee includes an incorrect serial number on his payment check, he has not adequately identified his payment, and the lease terminates by operation of law for failure to pay rental on or before the anniversary date of the lease.

Kiyoshi Matsuno, 107 IBLA 261 (Feb. 22, 1989)

A rental payment for an oil and gas lease sent to the wrong office does not constitute proper tender of rental. BLM is required to terminate an oil and gas lease for failure to pay rental timely, and properly looks to the lessee of record for such payment. The assignee of an oil and gas lease, however, may tender payment while approval of the assignment is pending.

Henry Y. Yoshino, 108 IBLA 47 (Mar. 21, 1989)

OIL AND GAS LEASES--Continued

RENTALS--Continued

BLM's cashing a late rental check and depositing it in an unearned account does not constitute acceptance of rental payment or a determination that a terminated oil and gas lease will be reinstated.

Clarence Souser, 108 IBLA 59 (Mar. 22, 1989)

A regulation requiring an increased rental rate of $2 per acre for reinstated leases found to be within a KGS which was not in effect at the time a lease was reinstated does not become a provision of the reinstated lease and does not apply to the lease.

Dyco Petroleum Corp., 108 IBLA 366 (May 16, 1989)

In petitioning for class I reinstatement of an oil and gas lease under 30 U.S.C. § 188(c) (1982), failure to exercise reasonable diligence in paying the rental may be considered justifiable if it is demonstrated that, at or near the anniversary date of the lease, there existed sufficiently extenuating circumstances outside the lessee's control which affected his actions in failing to make timely payment. Neither the fact that the lessee forgot to make the payment nor the fact that he was preoccupied with business matters will justify a late rental payment.

George Foster, 109 IBLA 82 (May 31, 1989)

The automatic termination provisions of 30 U.S.C. § 188 (1982), do not apply to an oil and gas lease which has been committed to a unit, where there is production from a unit well anywhere in the unit.

Walter S. Fees, Jr., 110 IBLA 377 (Sept. 19, 1989)

OIL AND GAS LEASES--Continued

ROYALTIES

Allowance of setoff of royalty overpayments against royalty underpayments discovered by a Minerals Management Service audit made more than 2 years after the overpayment is confined to the individual lease under audit.

Sun Exploration & Production Co., 106 IBLA 300 (Jan. 5, 1989)

30 CFR 218.54 authorizes the Minerals Management Service to assess late payment interest charges if royalty payments for oil and gas leases are unpaid or underpaid on the date the amounts are due. The imposition of late payment charges is appropriate to compensate the Government for the loss of the time value of funds due but not paid.

Santa Fe Energy Co., 106 IBLA 333 (Jan. 10, 1989)

Santa Fe Energy Co., 107 IBLA 121 (Feb. 2, 1989)

Where natural gas produced from Federal leases is sold under an arrangement where the buyers pay the maximum lawful price allowed under the Natural Gas Policy Act of 1978 and, in addition, reimburse the producer/seller for severance taxes it paid to the State of Wyoming, the gross proceeds received by the producer/seller from the leases consist of the maximum Natural Gas Policy Act price plus the tax reimbursements. Accordingly, in computing the "value" of the gas produced from these leases, MMS properly determines that the "gross proceeds" to which the royalty rate applies include the purchase price plus the tax reimbursements and properly demands additional royalty and late payment charges where royalty payments were made using a value that excluded the severance tax reimbursements.

Enron Corp., 106 IBLA 394 (Jan. 23, 1989)

An NTL-4A requiring compensation for the venting or flaring of natural gas in the absence of authorization was promulgated in the exercise of the Department's statutory and regulatory authority to require lessees to market oil and gas produced from the lease if economically feasible. A decision of BLM conclusively presuming that gas flared without prior authorization was avoidably lost, will be set aside and the case remanded to determine whether in fact it was economically feasible to market the gas at the time it was flared where BLM has since changed its interpretation of NTL-4A to give the lessee notice and an opportunity to show the gas was not marketable at the time and where it appears this interpretation is consistent with the intent of the underlying statutory and regulatory authority.

Ladd Petroleum Corp., Patrick Petroleum Corp. of Michigan, 107 IBLA 5 (Jan. 24, 1989)

MMS properly assesses late payment interest charges if royalty payments for oil and gas leases are unpaid or underpaid on the date the amounts are due. The imposition of late payment charges is appropriate to compensate the Government for the loss of the time value of the funds due but not paid.

Santa Fe Energy Co., 107 IBLA 32 (Jan. 25, 1989)

Late payment interest charges are properly assessed if royalty payments for oil and gas are underpaid when due.

Dugan Production Corp., 107 IBLA 91 (Feb. 1, 1989)

The Department has the authority to issue NTL's for Federal leases. NTL-4A governs compensation for oil and gas which is lost by an operator. Unless specifically allowed by the provisions of NTL-4A, venting or flaring of oil well gas must be approved in writing by an authorized officer. Unless it can be shown that it was uneconomic to recover the gas at the time it was vented or flared, gas which is vented or flared without prior authorization, approval, ratification, or acceptance is deemed to be avoidably

OIL AND GAS LEASES--Continued

ROYALTIES--Continued

lost. When produced gas is avoidably lost, the compensation due the United States is computed on the basis of the value of the gas avoidably lost, or the allocated portion thereof attributable to the lease.

The Department is entitled to rely on the reasoned analysis of its technical experts in matters within the realm of their expertise. If BLM supports a decision regarding the volume of gas avoidably lost by an operator with sufficient evidence to demonstrate a rational basis for that decision and that the decision was made in a careful and systematic manner, using the advice of such experts, the decision will not be rejected without a showing of error. The party challenging the decision has the burden of showing by a preponderance of the evidence that the determination is erroneous.

Mallon Oil Co., 107 IBLA 150 (Feb. 10, 1989)

The lessee of a Federal oil and gas lease committed to a communitization agreement providing for the apportionment of production among the leases committed thereto is responsible for payment of royalty to MMS on the share of production allocated to his lease. The lessor's entitlement to a royalty on the allocated share of production from any lessee/operator producing and selling communitized substances from the unit will not diminish the responsibility of the lessee where the operator has defaulted on the royalty obligation.

Jerry Chambers Exploration Co., John M. Beard, 107 IBLA 161 (Feb. 10, 1989)

The requirement set forth in a unit agreement to pay rental with respect to the nonparticipating acreage of unitized Outer Continental Shelf oil and gas leases but to pay minimum royalty with respect to the participating acreage does not effect a de facto segregation of such leases which would not be permitted in the absence of express statutory authorization.

Shell Offshore Inc., 107 IBLA 165 (Feb. 13, 1989)

OIL AND GAS LEASES--Continued

ROYALTIES--Continued

Late payment interest charges are properly assessed against payments of royalty made in Feb. and Mar. 1983, for gas produced and removed from a Federal lease from June 1981 through Jan. 1983.

Christmann Energy Corp., 107 IBLA 179 (Feb. 14, 1989)

An assessment for additional royalties and late payment charges is proper where the holder of an operating interest in part of the lands under lease fails to pay royalties at a rate based upon total lease production, notwithstanding the holder's statement that is sought, and did not receive, lease production data from MMS.

Phillips 66 Natural Gas Co. & Phillips Petroleum Co., 107 IBLA 223 (Feb. 21, 1989)

The holder of an Outer Continental Shelf oil and gas lease who timely pays royalty in kind, rather than in money, may not be assessed a late fee pursuant to 30 CFR 218.150(d), even if it failed to accurately report the volume of the production with the result that the United States failed to collect the proper amount of money when it sold that production to third parties.

Mobil Oil Corp., Mobil Oil Exploration & Producing Southeast Inc., 107 IBLA 332 (Mar. 14, 1989)

Under 30 U.S.C. § 226(b)(1) (1982), royalty is properly assessed on the amount of crude oil used to generate electricity in a cogeneration facility, where that electricity is the subject of a sale to a third party, even if the same electricity is subsequently repurchased and used for beneficial purposes on the lease.

Where royalty is due on crude oil which is utilized to produce electricity, the proper method of valuation for purposes of determining the amount of

OIL AND GAS LEASES--Continued

ROYALTIES--Continued

royalty due is the value of the crude oil had it been sold.

Petro-Lewis Corp., 108 IBLA 20 (Mar. 20, 1989)
96 I.D. 127

Sec. 111(a) of the Federal Oil and Gas Royalty Management Act, 30 U.S.C. § 1721(a) (1982), authorizes the collection of interest charges for late payment of oil and gas royalties. Sec. 305 of that Act, 30 U.S.C. § 1701 note (1982), provides that sec. 111 and regulations implemented pursuant thereto apply to oil and gas leases issued prior to the enactment of that Act, unless to do so would be contrary to express and specific provisions of those leases. Where no such provisions exist, the assessment of late payment charges is proper.

Coastal Oil and Gas Corp., et al., 108 IBLA 62 (Mar. 22, 1989)

Where BLM issues a decision conclusively presuming that gas flared on a Federal oil and gas lease without prior authorization from BLM was "avoidably lost," and where BLM subsequently issues an instruction memorandum adopting a significant change in the interpretation of BLM policy concerning determinations of whether gas flared from Federal and Indian leases is "avoidably lost" and directing BLM to review all prior determinations of avoidable loss to conform them to the new policy, BLM's decision will be vacated and the case remanded for further review under the terms of the new policy.

Willard Pease Oil & Gas Co., 108 IBLA 108 (Mar. 29, 1989)

Because oil and gas leases are assessed royalty on an individual basis, offsetting, i.e., crediting overpayments against underpayments, is properly limited to individual lease accounts.

The Minerals Management Service is authorized to impose late payment charges or exact interest as

compensation for the loss of use of money due but not paid as royalties.

Mesa Petroleum Co., 108 IBLA 149 (Apr. 5, 1989)

Minerals Management Service is required by law to assess interest (late payment) charges on royalty payments for oil and gas leases which are not received by the date such payments are due.

Nahama & Weagant Energy Co., 108 IBLA 209 (Apr. 19, 1989)

When Minerals Management Service determines value for royalty purposes, the burden to show error in the determination is on the lessee. Absent a showing of error, the determination of items of cost and revenue to be included in a manufacturing allowance are found to be correct.

When a lessee processes gas for recovery of liquid hydrocarbons, pursuant to 30 CFR 206.152 (1986) it must pay royalty either on the value of the wet gas before processing or the value of the residue gas after processing plus the value of the extracted liquids. The allowance which may not exceed two-thirds of the value of the liquids. When calculating the formula to be used for this purpose, it was error to include either the cost or value of processing condensate which was not derived from wet gas produced at the plant.

Transportation costs unrelated to the manufacturing process are not properly included in the formulation of a manufacturing allowance to be used in calculating the royalty value of natural gas.

When formulating a manufacturing allowance for purposes of calculating royalty, an allowance for expenses incidental to marketing ethane gas was properly denied. When calculating royalty pursuant to 30 CFR 206.150 (1986), the value of production shall not be less than fair market value, nor less than gross proceeds accruing from disposition of produced gas.

Mobil Oil Corp. & Mobil Exploration & Producing Services, Inc., 108 IBLA 216 (Apr. 19, 1986)

OIL AND GAS LEASES--Continued

ROYALTIES--Continued

BLM may, in accordance with 43 CFR 3108.2-3(f), reduce the royalty rate for a reinstated lease in three separate circumstances: (1) where it finds undue hardship or premature termination of production would result; (2) where a lessee has expended funds to develop the lease, after the rental was due and not paid, on the basis of any written action of the United States, its agents or employees, which preceded the expenditure of those funds and was a major consideration in their expenditure; or (3) where it finds it is equitable to do so for any other reason.

Where an oil and gas lessee requests, in accordance with 30 U.S.C. § 188(i)(2) (1982), and 43 CFR 3108.2-3(f), reduction of the increased royalty rate upon reinstatement of its lease on the basis that a written action by BLM preceded and was a major consideration in its expenditure of funds to develop the lands covered by the lease after the rental became due and was not paid, that request is properly denied when the record shows that although the lessee received a letter from BLM after the anniversary date of the lease, that letter did not precede and was not a major consideration in the lessee's expenditure of funds to develop the lands covered by the lease.

Mallon Oil Co., et al., 108 IBLA 241 (Apr. 24, 1989)

Where during an appeal from a decision of the Director, MMS, which concluded that the proper value of residue gas for royalty computation purposes is the highest applicable ceiling price for that gas in accordance with NTL-5, Congress enacts the NTL-5 Act, the Board will set aside that decision and remand the case for a recalculation of royalty owed in accordance with that statute.

In determining the value for royalty computation purposes of liquid hydrocarbons and residue gas derived from the processing of wet gas removed from a Federal onshore oil and gas lease, MMS is permitted by 30 CFR 206.106 (1986) to deduct not more than two-thirds of the value of the liquid hydrocarbons as the cost of manufacture, in the absence of action by the Secretary increasing the allowance.

BWAB Inc., 108 IBLA 250 (Apr. 25, 1989)

OIL AND GAS LEASES--Continued

ROYALTIES--Continued

When only a part of a producing oil and gas lease is committed to a unit agreement, the uncommitted portion is segregated into a new lease and given a new lease number. An assessment of late payment charges will be reversed where the royalty was timely paid but initially credited to the account of the parent lease rather than a segregated lease created by partial commitment of the parent lease to a unit agreement and the misidentification was the result of delay in notifying the payor of the segregation and the new lease number for the segregated lands.

Phillips Petroleum Co., 108 IBLA 340 (May 9, 1989)

Where the lessee under an Outer Continental Shelf oil and gas lease commits 10 percent of its gas production from the lease to a buyer and enters into a transportation agreement with that buyer to transport the uncommitted production to other buyers, the value of a "transportation allowance" (a percentage of the natural gas being delivered to the buyer as compensation for transportation service) will be calculated on the basis of a value determination letter pertaining to the sale of 10 percent of the production to the buyer, and not on the basis of warranty contract prices for sale of gas to other buyers.

Value for royalty purposes is determined independently of the price at which the commodity was sold. Under 30 CFR 250.64 (1981), 30 CFR 206.150 (1987), the value of production for royalty purposes may not be less than the fair market value.

Amoco Production Co., 108 IBLA 358 (May 15, 1989)

Generally

Where, in its royalty valuation, MMS applies a rate of return based on the prime interest rate on Jan. 1, 1975, but the time for valuation is Jan. 1976 - Dec. 1982, that determination will be set aside.

Where the Director, MMS, issues a decision in which he reserves the right to conduct further audits of certain Federal oil and gas leases and processing plants, the royalty payor is not adversely affected

OIL AND GAS LEASES--Continued

ROYALTIES--Continued

Generally--Continued

and, therefore, lacks standing to appeal that declaration.

Phillips Petroleum Co., 109 IBLA 4 (May 23, 1989)

In the absence of a market for oil at the wellhead where production would ordinarily be sold and valued, the deduction of a transportation allowance from the value of the oil at the nearest available market has been allowed. Although the point of first "sale" of oil is generally an indicia of the existence of a market, the substance of a transportation will prevail over form and a decision rejecting a transportation allowance for oil "sold" to a pipeline will be set aside where it appears from the record that the oil was held for the account of the lessee, the lessee received no consideration for "sale" of the oil, the oil was redelivered to the lessee at the end of the pipeline, and the only consideration paid was a $2.50-per-barrel service charge to the pipeline.

ARCO Oil & Gas Co., 109 IBLA 34 (May 25, 1989)

Under the regulations then in effect, a transportation allowance formula issued by Minerals Management Service fixing the rate of return on undepreciated investment to be included in the formula is not subject to the notice and comment provisions of 5 U.S.C. § 553(b) (1982).

Under the regulations in effect at the time that the transportation allowance formula was adopted, the Secretary of the Interior had discretionary authority to determine the factors to be considered when computing transportation allowances for royalty valuation purposes. When it is shown that the Minerals Management Service applied a formula which had been developed after appropriate research and consultation with affected oil companies and the appellant does not provide convincing evidence that a 8-percent rate of return on the undepreciated investment used in the formula was unreasonable, the transportation allowance will be upheld.

Conoco, Inc., 109 IBLA 89 (May 31, 1989)

Under 30 CFR 250.64, the value of production of crude oil produced from a lease issued under the Outer Continental Shelf Lands Act for the purposes of computing royalties may not be less than "gross proceeds accruing to the lessee from the disposition of the produced substances." MMS properly determined that "gross proceeds" includes "tertiary incentive revenue" under 10 CFR 212.78 (1980).

Pennzoil Oil & Gas, Inc., 109 IBLA 147 (June 8, 1989)

Crediting within an audit of overpayments against underpayments of royalty on oil and gas leases is properly limited to individual lease accounts. Credits may not be allowed (offset) between unrelated lease accounts because oil and gas leases are individually assessed for royalty due.

Union Oil Co. of California, 110 IBLA 62 (July 20, 1989)

Sec. 308 of FOGRMA, 30 U.S.C. § 1756 (1982), requiring payment of royalties on oil or gas lost or wasted from a lease site, is applicable to gas vented and flared as a result of a 1985 well blowout on a lease issued prior to enactment of FOGRMA on the Outer Continental Shelf.

Chevron U.S.A. Inc., et al., 110 IBLA 216 (Aug. 23, 1989)

In the absence of acceptance of the lessee's royalty valuation as conclusive by an official authorized to bind the Department on this matter, the Department is not barred from rejecting the valuation, valuing production by another acceptable method, and demanding payment of royalty based on this method.

Conoco Inc., ARCO Oil & Gas Co., 110 IBLA 232 (Aug. 29, 1989)

Where the appropriate Oil and Gas Supervisor issues a letter determining the proper method of computing royalties owed to the United States based on the assumption that the natural gas involved is subject to price control, and that gas is subsequently decontrolled, the letter ceases to be a valid basis for the computation of the amount of royalty due to the United States.

As a general rule, "reasonable value" for the purpose of calculating royalties due to the United States will be the highest price paid for the major portion of like quality products produced or sold from the same field or area or the gross proceeds actually received by the lessee, whichever is higher.

Where royalty payments are dependent upon the price at which the product is marketed, oil and gas lessees are generally deemed to have an implied obligation to exercise good faith in the marketing of the production from the lease, though claims for increased royalties are subject to the defense that the lessee exercised reasonable business judgment. Where, however, for no justifiable reason, a lessee fails to timely invoke a clause permitting renegotiation of the price received with the result that royalties continue to be based on a lower price, the lessee is properly required to tender additional royalties based on the prices received by other lessees who timely invoked similar renegotiation provisions.

Where a Federal oil and gas lessee voluntarily agrees to reduction in the price paid for oil or gas by an affiliated purchaser, and the evidence establishes that, but for the affiliated relationship between the lessee and the purchaser, a higher price would have been obtained for the production, the lessee is properly deemed to have breached its duty of fair dealing with the lessor and royalty is properly computed based on the prices received by other lessees who had similar contractual arrangements with the producer but who refused to assent to lower payments for their production from the same lease.

Transco Exploration Co. & TXP Operating Co., 110 IBLA 282 (Sept. 13, 1989) 96 I.D. 367

OIL AND GAS LEASES--Continued

ROYALTIES--Continued

Generally--Continued

The offsetting of overpayments of royalty on natural gas production from an offshore oil and gas lease against underpayments of royalty may only take place after an official audit and within the royalty account of a single lease. Offsetting between leases is not permitted.

Chevron U.S.A. Inc., 111 IBLA 92 (Sept. 26, 1989)

Interest

Where an MMS bill for collection demanding interest on late payments of royalties is challenged by the royalty payor in an appeal to the Director, MMS, solely on the basis that interest was assessed from an improper date, resulting in an overcharge, thereby acquiescing in MMS' authority to assess interest, the Board of Land Appeals, in a subsequent appeal of the Director's decision by that royalty payor, may decline to entertain arguments directed to MMS' authority to assess interest.

MMS is required by 30 CFR 218.54(a) and 30 CFR 218.150(c) to assess interest for late payment of royalties from the date the royalties were due. Arguments that interest should be assessed from the date the lessee was notified of the underpayment or from the date the lessee received payment from the purchaser of the products are properly rejected.

ANR Production Co., 108 IBLA 387 (May 22, 1989)

MMS is authorized to impose an interest charge where it determines that a royalty payor has failed to pay timely the proper amount of royalty due on the value of production of wet gas.

Where a royalty payor submits funds to MMS in response to a demand for alleged underpayments of royalties, and MMS subsequently refunds a portion of those funds, the payor is not entitled to interest on the refunded amount.

Phillips Petroleum Co., 109 IBLA 4 (May 23, 1989)

OIL AND GAS LEASES--Continued

ROYALTIES--Continued

Natural Gas Liquid Products

Where it is MMS policy to accept the Department of Energy ceiling prices for natural gas liquid products as representing fair market value for royalty purposes in certain instances, and MMS has followed that policy in a number of cases, its refusal in another case to accept those ceiling prices, in favor of a weighted average price that the royalty payor paid for other liquids which it purchased, is arbitrary and capricious.

Where the actual costs of processing wet gas are less than two-thirds the value of the natural gas liquids produced, calculation of a processing allowance based on actual costs, rather than that two-thirds value, pursuant to 30 CFR 221.51 (1976), will be affirmed.

Phillips Petroleum Co., 109 IBLA 4 (May 23, 1989)

The valuation of natural gas liquid products for purposes of computing the royalty due is required by statute and regulation to be not less than the greater of the fair market value or the gross proceeds realized by the lessee. One of the factors to be considered in assessing fair market value under the regulation governing royalty valuation is posted prices. A determination of fair market value based on posted spot market prices will be sustained as consistent with the regulation in the absence of a showing that this is inconsistent with fair market value.

A policy guideline interpreting the royalty valuation regulation as it applies to natural gas liquid products is properly distinguished from a regulation having the force and effect of law promulgated in accordance with the rulemaking requirements of the Administrative Procedure Act. Although such a policy guideline is not binding on the Board and will not be followed where it is inconsistent with the relevant regulation, it will be upheld by the Board on appeal where it provides a reasonable basis for a decision applying the royalty valuation regulation and is consistent therewith.

Where the low-posted spot market price for the month for natural gas liquid products is found by MMS to establish the fair market value floor for royalty

ROYALTIES--Continued

Natural Gas Liquid Products--Continued

valuation, a decision assessing additional royalty charges based on the difference between lessee's reported valuation and the average spot market price will be set aside and remanded.

Conoco Inc., ARCO Oil & Gas Co., 110 IBLA 232 (Aug. 29, 1989)

Processing Allowance

Where the actual costs of processing wet gas are less than two-thirds the value of the natural gas liquids produced, calculation of a processing allowance based on actual costs, rather than that two-thirds value, pursuant to 30 CFR 221.51 (1976), will be affirmed.

Where MMS is valuing production from onshore oil and gas leases at the tailgate of the processing plant for the period from 1976-1982, the costs of gathering and compressing wet gas for movement to the plant are not expenses incidental to marketing within the meaning of 30 CFR 221.51(b) (1976), nor are they expenses that may be included as part of the manufacturing or processing allowance; however, the costs associated with moving the gas from the field to the processing plant may be separately deductible as a transportation allowance.

Phillips Petroleum Co., 109 IBLA 4 (May 23, 1989)

STIPULATIONS

Under sec. 306 of the Act of Sept. 28, 1984 (the Utah Wilderness Act), Congress authorized BLM to issue leases for carbon dioxide gas in five areas within the Escalante KGS, subject to express restrictions on "exploration" and "development." Where BLM offers the areas for lease subject to a stipulation that fails adequately to enforce the statutory restrictions, and where BLM imposes this stipulation on only three of these five areas covered by sec. 306 of this Act, BLM's decision to receive bids on these areas will be

OIL AND GAS LEASES--Continued

STIPULATIONS--Continued

set aside and the case remanded for issuance of leases of the five areas without the stipulation.

Southern Utah Wilderness Alliance et al., 108 IBLA 318 (Apr. 28, 1989)

BLM may properly require a reasonable contingency plan for salinity control in stipulations to a permit for surface discharge of water pursuant to the provisions of Notice to Lessees and Operators of Federal and Indian Oil and Gas Lessees (NTL-2B), and the regulations in 43 CFR 3162.5-1 which control disposition of water produced during production of oil and gas on Federal lands. NTL-2B sets forth requirements for handling, storage, or disposal of water produced from oil and gas wells with which all lessees must comply. Methods of water disposal used by a lessee must be approved by BLM.

A. G. Andrikopoulos Oil & Gas Properties, 108 IBLA 369 (May 17, 1989)

If the successful bidder for a competitive oil and gas lease elected to execute a special stipulation required by BLM rather than appealing the decision requiring the stipulation, failure to appeal that decision renders it final and precludes the lessee from contending, in a later appeal brought from action by BLM enforcing the stipulation, that the requirement was not properly imposed.

George A. Haddad, Jr., 109 IBLA 394 (June 26, 1989)

SUSPENSIONS

When the Secretary directs or consents to a suspension of operations and production in the interest of conservation under sec. 39 of the Mineral Leasing Act of 1920, 30 U.S.C. § 209 (1982), the lessee is denied all beneficial use of the lease during the period of suspension. The existence of litigation involving

OIL AND GAS LEASES--Continued

SUSPENSIONS--Continued

whether an oil and gas lease was issued in violation of the National Environmental Policy Act, 42 U.S.C. § 4321-4334 (1982), and sec. 7 of the Threatened and Endangered Species Act, 16 U.S.C. § 1539 (1982), does not amount to the denial of beneficial use of the lease, absent an injunction against activity under the lease. In such a case, BLM properly denies a request for a suspension.

Paul C. Kohlman, 111 IBLA 107 (Sept. 28, 1989)

TERMINATION

It is the lessee's responsibility to see that any payment tendered for annual rental on an oil and gas lease is so identified that the appropriate State Office can credit that payment to the proper lease account. When both the official assignment creating a new lease and the notice informing the assignee that the assignment has been approved contain the correct serial number, the new lease terminates by operation of law for failure to pay rental on or before the anniversary date of the lease when the assignor, in tendering annual rental, provides the base lease serial number but fails to identify the new lease by its serial number. BLM properly deems the amount in excess of the payment due on the base lease to be an overpayment on the base lease to be returned to the assignor.

James A. Lynch, Jr., 107 IBLA 253 (Feb. 22, 1989)

Walter T. Clark, Jr., 107 IBLA 257 (Feb. 22, 1989)

It is the responsibility of a lessee to see that any payment tendered for annual rental on an oil and gas lease is so identified that the appropriate State Office can credit that payment to the proper lease account. When both the official assignment creating the lease and the notice informing the assignee that the assignment has been approved contains the correct serial number, but the lessee includes an incorrect

OIL AND GAS LEASES--Continued

TERMINATION--Continued

serial number on his payment check, he has not adequately identified his payment, and the lease terminates by operation of law for failure to pay rental on or before the anniversary date of the lease.

Under 30 U.S.C. § 188(c)(1982), BLM has no authority to reinstate a noncompetitive oil and gas lease terminated by operation of law for failure to pay annual rental timely unless the full amount of the rental due is submitted within 20 days after the anniversary date and other requirements are met.

Kiyoshi Matsuno, 107 IBLA 261 (Feb. 22, 1989)

A rental payment for an oil and gas lease sent to the wrong office does not constitute proper tender of rental. BLM is required to terminate an oil and gas lease for failure to pay rental timely, and properly looks to the lessee of record for such payment. The assignee of an oil and gas lease, however, may tender payment while approval of the assignment is pending.

Henry Y. Yoshino, 108 IBLA 47 (Mar. 21, 1989)

Reinstatement of a terminated oil and gas lease pursuant to 30 U.S.C. § 188(c) (1982), requires a showing by the lessee that the late rental payment was either justifiable or not due to a lack of reasonable diligence. Mailing the rental payment after the due date is not reasonable diligence. The complexity of the lessee's business affairs will not justify a late payment.

Clarence Souser, 108 IBLA 59 (Mar. 22, 1989)

An oil and gas lease which is in its extended term by reason of production terminates by operation of law when it is determined that the lease no longer has a well capable of production in paying quantities and no approved reworking or drilling operations are commenced within 60 days of cessation of production.

Upon a determination that production has ceased on an oil and gas lease in its extended term by reason of such production because the well on the lease is no

longer capable of production in paying quantities, the affected parties are entitled to notice and an opportunity to request a hearing on the issue of the productive capacity of the well where they have presented evidence raising an issue of fact regarding the status of the well.

Daymon D. Gililland, 108 IBLA 144 (Apr. 5, 1989)

BLM may, in accordance with 43 CFR 3108.2-3(f), reduce the royalty rate for a reinstated lease in three separate circumstances: (1) where it finds undue hardship or premature termination of production would result; (2) where a lessee has expended funds to develop the lease, after the rental was due and not paid, on the basis of any written action of the United States, its agents or employees, which preceded the expenditure of those funds and was a major consideration in their expenditure; or (3) where it finds it is equitable to do so for any other reason.

Where an oil and gas lessee requests, in accordance with 30 U.S.C. § 188(i)(2) (1982), and 43 CFR 3108.2-3(f), reduction of the increased royalty rate upon reinstatement of its lease on the basis that a written action by BLM preceded and was a major consideration in its expenditure of funds to develop the lands covered by the lease after the rental became due and was not paid, that request is properly denied when the record shows that although the lessee received a letter from BLM after the anniversary date of the lease, that letter did not precede and was not a major consideration in the lessee's expenditure of funds to develop the lands covered by the lease.

Mallon Oil Co., et al., 108 IBLA 241 (Apr. 24, 1989)

Reinstatement of a terminated oil and gas lease pursuant to 30 U.S.C. § 188(c) (1982), requires a showing by the lessee that the late rental payment was either justifiable or not due to a lack of reasonable diligence. Mailing the rental payment after the due date is not reasonable diligence.

Nyle Edwards, 109 IBLA 72 (May 30, 1989)

OIL AND GAS LEASES--Continued

TERMINATION--Continued

Pursuant to 30 U.S.C. § 188(b) (1982), when a lessee fails to pay the required rental on or before the anniversary date of the lease, and the lease has no well capable of producing oil or gas in paying quantities, the lease shall automatically terminate by operation of law. The Secretary may reinstate the lease, pursuant to 30 U.S.C. § 188(c) (1982), if the full rental is paid within 20 days of the lease anniversary date, and the failure to timely pay was justifiable or not due to a lack of reasonable diligence. Mailing the rental payment after the lease anniversary date does not constitute reasonable diligence.

Under procedures for class I reinstatement, 30 U.S.C. § 188(c) (1982), failure to exercise reasonable diligence in paying the rental for an oil and gas lease may be considered justifiable if it is demonstrated that, at or near the anniversary date, there existed sufficiently extenuating circumstances outside of the lessee's control which affected her actions in failing to make timely payment. Mere negligence, forgetfulness, and inadvertence of the lessee in effecting rental timely are not sufficient to warrant class I reinstatement.

Nancy Houston, 109 IBLA 79 (May 31, 1989)

Pursuant to 30 U.S.C. § 188(b) (1982), when a lessee fails to pay the required rental on or before the anniversary date of the lease, on which there is no well capable of producing oil or gas in paying quantities, the lease shall automatically terminate by operation of law. The Secretary may reinstate the lease, pursuant to 30 U.S.C. § 188(c) (1982), if the full rental is paid within 20 days of the lease anniversary date, and failure to timely pay was justifiable or not due to a lack of reasonable diligence. Mailing the rental payment after the lease anniversary date does not constitute reasonable diligence.

George Foster, 109 IBLA 82 (May 31, 1989)

OIL AND GAS LEASES--Continued

TERMINATION--Continued

Pursuant to 30 U.S.C. § 188(b) (1982), when a lessee fails to pay the required rental on or before the anniversary date of the lease, on which there is no well capable of producing oil or gas in paying quantities, the lease shall automatically terminate by operation of law. The Secretary may reinstate the lease, pursuant to 30 U.S.C. § 188(c) (1982), if the full rental is paid within 20 days of the lease anniversary date, and the failure to timely pay was justifiable or not due to a lack of reasonable diligence. Mailing the rental payment on the date it is due will not establish reasonable diligence in the absence of a postmark on or before the lease anniversary date (or if the office is closed on the anniversary date, the next day the office is open) as required by the regulation at 43 CFR 3108.2-2(a), 53 FR 17357 (May 16, 1988).

Seth & Alice Swift, 109 IBLA 270 (June 16, 1989)

UNIT AND COOPERATIVE AGREEMENTS

The requirement set forth in a unit agreement to pay rental with respect to the nonparticipating acreage of unitized Outer Continental Shelf oil and gas leases but to pay minimum royalty with respect to the participating acreage does not effect a de facto segregation of such leases which would not be permitted in the absence of express statutory authorization.

The Minerals Management Service properly denies a request for a refund of rental paid with respect to the nonparticipating acreage of unitized Outer Continental Shelf oil and gas leases where the unit agreement properly requires such payment consistent with the Outer Continental Shelf Lands Act, as amended, 43 U.S.C. §§ 1331-1356 (1982).

Shell Offshore Inc., 107 IBLA 165 (Feb. 13, 1989)

OIL AND GAS LEASES--Continued

UNIT AND COOPERATIVE AGREEMENTS--Continued

Under 30 U.S.C. § 226(b)(1) (1982), royalty is properly assessed on the amount of crude oil used to generate electricity in a cogeneration facility, where that electricity is the subject of a sale to a third party, even if the same electricity is subsequently repurchased and used for beneficial purposes on the lease.

Where royalty is due on crude oil which is utilized to produce electricity, the proper method of valuation for purposes of determining the amount of royalty due is the value of the crude oil had it been sold.

Petro-Lewis Corp., 108 IBLA 20 (Mar. 20, 1989)
96 I.D. 127

A unit agreement may not be unilaterally reformed by BLM to include land which has not been committed to the unit agreement.

Where an unleased tract has been determined to be within a participating area pursuant to an approved unitization plan, revenues attributable to the tract held in escrow pursuant to the plan may not be used by BLM to secure a favorable bargain under competitive leasing requirements.

Lands not committed to a unit agreement may not participate in any production from unitized lands.

Unleased Federal lands determined to be productive in paying quantities as part of a unitization plan may not be considered "unitized" to protect the uncommitted land from drainage.

Once a unit operating agreement has become effective BLM lacks authority to amend the agreement without the parties' consent.

Coors Energy Co., 110 IBLA 250 (Sept. 11, 1989)

UNIT AND COOPERATIVE AGREEMENTS--Continued

The automatic termination provisions of 30 U.S.C. § 188 (1982), do not apply to an oil and gas lease which has been committed to a unit, where there is production from a unit well anywhere in the unit.

Walter S. Fees, Jr., 110 IBLA 377 (Sept. 19, 1989)

A party is not required to appeal from a BLM letter which does not adversely affect it, is informative in nature, and does not set forth appeal rights.

For onshore operations, the congressional grant of authority, found at 30 U.S.C. § 226(j) (1982), authorizes the Secretary to order the combining of units and participating areas for conservation reasons. Included in this grant is the authority to approve any unit plan he may deem necessary or proper to secure the proper protection of the public interest, to mandate unitization, and to prescribe a plan which shall adequately protect the rights of all parties in interest, including the United States, and this authority may be exercised over the objections of working and royalty interest owners affected by that action. Having the authority to create, expand, or contract units and participating areas, the Secretary also has the concomitant authority to order such joinder as is necessary to implement that decision.

Under 30 U.S.C. § 226(j) (1982), as a condition precedent to establishing, expanding, or contracting a unit, the "reasonableness" of the proposal must be considered by the Department.

A unit operating agreement is a private contract document between one or more working interest owners and the unit operator providing for payment and allocation of costs and expenses incurred by the unit operator when conducting unit operations. Once a unit operating agreement has become effective, BLM lacks the authority to amend the agreement without the parties' consent.

Chevron U.S.A. Inc., 111 IBLA 96 (Sept. 28, 1989)

WELL CAPABLE OF PRODUCTION

An oil and gas lease which is in its extended term by reason of production terminates by operation of law when it is determined that the lease no longer has a well capable of production in paying quantities and no approved reworking or drilling operations are commenced within 60 days of cessation of production.

Upon a determination that production has ceased on an oil and gas lease in its extended term by reason of such production because the well on the lease is no longer capable of production in paying quantities, the affected parties are entitled to notice and an opportunity to request a hearing on the issue of the productive capacity of the well where they have presented evidence raising an issue of fact regarding the status of the well.

Daymon D. Gililland, 108 IBLA 144 (Apr. 5, 1989)

OREGON AND CALIFORNIA RAILROAD AND RECONVEYED COOS BAY GRANT LANDS

TIMBER SALES

A BLM decision to proceed with a proposed timber sale will not be disturbed on appeal where the appellant has not established that BLM failed to consider relevant matters of environmental concern, such as the impact on soils, water quality, and wildlife, or that the decision was unsupported by the record or contrary to law or fact.

In re Crane Prairie Timber Sale, 109 IBLA 188 (June 12, 1989)

OUTER CONTINENTAL SHELF LANDS ACT

OIL AND GAS LEASES

Where the lessee under an Outer Continental Shelf oil and gas lease commits 10 percent of its gas production from the lease to a buyer and enters into a transportation agreement with that buyer to transport the uncommitted production to other buyers, the value of a "transportation allowance" (a percentage of the

natural gas being delivered to the buyer as compensation for transportation service) will be calculated on the basis of a value determination letter pertaining to the sale of 10 percent of the production to the buyer, and not on the basis of warranty contract prices for sale of gas to other buyers.

Value for royalty purposes is determined independently of the price at which the commodity was sold. Under 30 CFR 250.64 (1981), 30 CFR 206.150 (1987), the value of production for royalty purposes may not be less than the fair market value.

Amoco Production Co., 108 IBLA 358 (May 15, 1989)

In the absence of a market for oil at the wellhead where production would ordinarily be sold and valued, the deduction of a transportation allowance from the value of the oil at the nearest available market has been allowed. Although the point of first "sale" of oil is generally an indicia of the existence of a market, the substance of a transportation will prevail over form and a decision rejecting a transportation allowance for oil "sold" to a pipeline will be set aside where it appears from the record that the oil was held for the account of the lessee, the lessee received no consideration for "sale" of the oil, the oil was redelivered to the lessee at the end of the pipeline, and the only consideration paid was a $2.50-per-barrel service charge to the pipeline.

ARCO Oil & Gas Co., 109 IBLA 34 (May 25, 1989)

Under the regulations then in effect, a transportation allowance formula issued by Minerals Management Service fixing the rate of return on undepreciated investment to be included in the formula is not subject to the notice and comment provisions of 5 U.S.C. § 553(b) (1982).

Under the regulations in effect at the time that the transportation allowance formula was adopted, the Secretary of the Interior had discretionary authority to determine the factors to be considered when computing transportation allowances for royalty valuation purposes. When it is shown that the Minerals Management Service applied a formula which had been developed after

OUTER CONTINENTAL SHELF LANDS ACT--Continued

OIL AND GAS LEASES--Continued

appropriate research and consultation with affected oil companies and the appellant does not provide convincing evidence that a 8-percent rate of return on the undepreciated investment used in the formula was unreasonable, the transportation allowance will be upheld.

Conoco, Inc., 109 IBLA 89 (May 31, 1989)

Under 30 CFR 250.64, the value of production of crude oil produced from a lease issued under the Outer Continental Shelf Lands Act for the purposes of computing royalties may not be less than "gross proceeds accruing to the lessee from the disposition of the produced substances." MMS properly determined that "gross proceeds" includes "tertiary incentive revenue" under 10 CFR 212.78 (1980).

Pennzoil Oil & Gas, Inc., 109 IBLA 147 (June 8, 1989)

Sec. 308 of FOGRMA, 30 U.S.C. § 1756 (1982), requiring payment of royalties on oil or gas lost or wasted from a lease site, is applicable to gas vented and flared as a result of a 1985 well blowout on a lease issued prior to enactment of FOGRMA on the Outer Continental Shelf.

Chevron U.S.A. Inc., et al., 110 IBLA 216 (Aug. 23, 1989)

The valuation of natural gas liquid products for purposes of computing the royalty due is required by statute and regulation to be not less than the greater of the fair market value or the gross proceeds realized by the lessee. One of the factors to be considered in assessing fair market value under the regulation governing royalty valuation is posted prices. A determination of fair market value based on posted spot market prices will be sustained as consistent with the regulation in the absence of a showing that this is inconsistent with fair market value.

A policy guideline interpreting the royalty valuation regulation as it applies to natural gas liquid products is properly distinguished from a regulation having the force and effect of law promulgated

in accordance with the rulemaking requirements of the Administrative Procedure Act. Although such a policy guideline is not binding on the Board and will not be followed where it is inconsistent with the relevant regulation, it will be upheld by the Board on appeal where it provides a reasonable basis for a decision applying the royalty valuation regulation and is consistent therewith.

In the absence of acceptance of the lessee's royalty valuation as conclusive by an official authorized to bind the Department on this matter, the Department is not barred from rejecting the valuation, valuing production by another acceptable method, and demanding payment of royalty based on this method.

Where the low-posted spot market price for the month for natural gas liquid products is found by MMS to establish the fair market value floor for royalty valuation, a decision assessing additional royalty charges based on the difference between lessee's reported valuation and the average spot market price will be set aside and remanded.

Conoco Inc., ARCO Oil & Gas Co., 110 IBLA 232 (Aug. 29, 1989)

The procedures set forth at 30 CFR 250.70 - 250.80 (1987) only apply in those cases involving the assessment of a civil penalty.

Where MMS issues an order requiring the submission of additional past royalties and thereafter denies a request from the lessee that it be permitted to post a bond in lieu of tendering the money during the pendency of an appeal, the failure of the lessee to appeal from the decision of MMS denying the request to post a bond and the subsequent tender of the amount demanded constitutes a waiver of any objection to the requirement that the money be tendered during the pendency of the appeal.

Where the appropriate Oil and Gas Supervisor issues a letter determining the proper method of computing royalties owed to the United States based on the assumption that the natural gas involved is subject to price control, and that gas is subsequently decontrolled, the letter ceases to be a valid basis

for the computation of the amount of royalty due to the United States.

As a general rule, "reasonable value" for the purpose of calculating royalties due to the United States will be the highest price paid for the major portion of like quality products produced or sold from the same field or area or the gross proceeds actually received by the lessee, whichever is higher.

Where royalty payments are dependent upon the price at which the product is marketed, oil and gas lessees are generally deemed to have an implied obligation to exercise good faith in the marketing of the production from the lease, though claims for increased royalties are subject to the defense that the lessee exercised reasonable business judgment. Where, however, for no justifiable reason, a lessee fails to timely invoke a clause permitting renegotiation of the price received with the result that royalties continue to be based on a lower price, the lessee is properly required to tender additional royalties based on the prices received by other lessees who timely invoked similar renegotiation provisions.

Where a Federal oil and gas lessee voluntarily agrees to reduction in the price paid for oil or gas by an affiliated purchaser, and the evidence establishes that, but for the affiliated relationship between the lessee and the purchaser, a higher price would have been obtained for the production, the lessee is properly deemed to have breached its duty of fair dealing with the lessor and royalty is properly computed based on the prices received by other lessees who had similar contractual arrangements with the producer but who refused to assent to lower payments for their production from the same lease.

Transco Exploration Co. & TXP Operating Co., 110 IBLA 282 (Sept. 13, 1989) - 96 I.D. 367

REFUNDS

Allowance of setoff of royalty overpayments against royalty underpayments discovered by a Minerals Management Service audit made more than 2 years after the

OUTER CONTINENTAL SHELF LANDS ACT--Continued

REFUNDS--Continued

overpayment is confined to the individual lease under audit.

Sun Exploration & Production Co., 106 IBLA 300 (Jan. 5, 1989)

A person claiming a refund of excess royalty payments must file a request within 2 years of the date payments were made. A refund claimant may not circumvent the refund procedures prescribed by Congress in sec. 10 of the Outer Continental Shelf Lands Act, 43 U.S.C. § 1339 (1982), by "offsetting" prior alleged overpayments against future obligations.

Santa Fe Energy Co., 106 IBLA 333 (Jan. 10, 1989)

Santa Fe Energy Co., 107 IBLA 32 (Jan. 25, 1989)

Santa Fe Energy Co., 107 IBLA 121 (Feb. 2, 1989)

The Minerals Management Service properly denies a request for a refund of rental paid with respect to the nonparticipating acreage of unitized Outer Continental Shelf oil and gas leases where the unit agreement properly requires such payment consistent with the Outer Continental Shelf Lands Act, as amended, 43 U.S.C. §§ 1331-1356 (1982).

Shell Offshore Inc., 107 IBLA 165 (Feb. 13, 1989)

The refund provision of the Outer Continental Shelf Lands Act, 43 U.S.C. § 1339 (1982), authorizes the Secretary of the Interior to approve refunds for overpayments made in regard to Outer Continental Shelf leases. The Secretary's authority is conditioned upon a request being filed within 2 years after the date a payment is made.

MMS may not deny a request for refund of royalties from a holder of one of several working interests in several leases that remit royalties on their own behalf on the grounds that the holder has

OUTER CONTINENTAL SHELF LANDS ACT--Continued

REFUNDS--Continued

not made a showing that the lease accounts as a whole were overpaid.

Mesa Petroleum Co., 107 IBLA 184 (Feb. 14, 1989)

Because oil and gas leases are assessed royalty on an individual basis, offsetting, i.e., crediting overpayments against underpayments, is properly limited to individual lease accounts.

Mesa Petroleum Co., 108 IBLA 149 (Apr. 5, 1989)

Crediting within an audit of overpayments against underpayments of royalty on oil and gas leases is properly limited to individual lease accounts. Credits may not be allowed (offset) between unrelated lease accounts because oil and gas leases are individually assessed for royalty due.

Union Oil Co. of California, 110 IBLA 62 (July 20, 1989)

The offsetting of overpayments of royalty on natural gas production from an offshore oil and gas lease against underpayments of royalty may only take place after an official audit and within the royalty account of a single lease. Offsetting between leases is not permitted.

Chevron U.S.A. Inc., 111 IBLA 92 (Sept. 26, 1989)

UNIT PLANS

The requirement set forth in a unit agreement to pay rental with respect to the nonparticipating acreage of unitized Outer Continental Shelf oil and gas leases but to pay minimum royalty with respect to the participating acreage does not effect a de facto segregation of such leases which would not be permitted in the absence of express statutory authorization.

The Minerals Management Service properly denies a request for a refund of rental paid with respect

UNIT PLANS--Continued

to the nonparticipating acreage of unitized Outer Continental Shelf oil and gas leases where the unit agreement properly requires such payment consistent with the Outer Continental Shelf Lands Act, as amended, 43 U.S.C. §§ 1331-1356 (1982).

Shell Offshore Inc., 107 IBLA 165 (Feb. 13, 1989)

PATENTS OF PUBLIC LANDS

GENERALLY

A corporation organized under the laws of the United States or of any state or territory thereof may occupy and purchase mining claims from the Government, irrespective of the ownership of stock therein by persons, corporations, or associations not citizens of the United States.

Melvin Helit, A-Able Plumbing, Inc., 110 IBLA 144 (Aug. 10, 1989)

EFFECT

When a patent without reservation of minerals to the United States is issued subsequent to the location of a placer mining claim on the same land, the effect is to remove from the jurisdiction of this Department the consideration of questions concerning rights to the land.

Kenneth Russell, 109 IBLA 180 (June 9, 1989)

The effect of issuing a Native Allotment, like the issuance of patent, is to transfer the legal title from the United States and to remove the Department's jurisdiction to resolve conflicts concerning rights to the land.

The Bureau of Land Management's approval of a Native allotment application vests equitable title, but does not vest legal title. This equitable title is susceptible of being administratively modified or revoked by the Department if, prior to issuance of a

EFFECT--Continued

Native Allotment, the Department finds that the land in question, or any part of it, was not vacant, unappropriated, and unreserved nonmineral land during the period of the applicant's use and occupancy.

Ramona Field, 110 IBLA 367 (Sept. 14, 1989)

SUITS TO CANCEL

An Alaska Native allotment which has not automatically vested pursuant to ANILCA is properly adjudicated under the Act of May 17, 1906. The question of the validity of the application is separate and apart from the issue of the ownership of the lands named in the application, and the Department has the jurisdiction to address this question, even though the lands described in the application, may have been congressionally conveyed to another party. The Department had an ongoing trust obligation to Alaska Natives, and therefore retains jurisdiction to determine the validity of the Native allotment application. This action is necessary in order to determine whether it is necessary for the Department to take action to recover the land for the benefit of the Native applicant.

Kootznoowoo, Inc. v. Heirs of Jimmie Johnson, 109 IBLA 128 (June 8, 1989)

PAYMENTS

GENERALLY

30 CFR 218.54 authorizes the Minerals Management Service to assess late payment interest charges if royalty payments for oil and gas leases are unpaid or underpaid on the date the amounts are due. The imposition of late payment charges is appropriate to compensate the Government for the loss of the time value of funds due but not paid.

Santa Fe Energy Co., 106 IBLA 333 (Jan. 10, 1989)

Santa Fe Energy Co., 107 IBLA 121 (Feb. 2, 1989)

PAYMENTS--Continued

GENERALLY--Continued

MMS properly assesses late payment interest charges if royalty payments for oil and gas leases are unpaid or underpaid on the date the amounts are due. The imposition of late payment charges is appropriate to compensate the Government for the loss of the time value of the funds due but not paid.

Santa Fe Energy Co., 107 IBLA 32 (Jan. 25, 1989)

Late payment interest charges are properly assessed if royalty payments for oil and gas are underpaid when due.

Dugan Production Corp., 107 IBLA 91 (Feb. 1, 1989)

Late payment interest charges are properly assessed against payments of royalty made in Feb. and Mar. 1983, for gas produced and removed from a Federal lease from June 1981 through Jan. 1983.

Christmann Energy Corp., 107 IBLA 179 (Feb. 14, 1989)

Where MMS imposes late payment charges in accordance with 30 CFR 218.200(a) (1986), a coal lessee may not invoke the estimated payment exception in that regulation when there is no evidence that the lessee sought prior authorization from MMS to make estimated payments.

Utah International, Inc., 107 IBLA 217 (Feb. 21, 1989)

The Minerals Management Service is authorized to impose late payment charges or exact interest as compensation for the loss of use of money due but not paid as royalties.

Mesa Petroleum Co., 108 IBLA 149 (Apr. 5, 1989)

PAYMENTS--Continued

GENERALLY--Continued

When Minerals Management Service determines value for royalty purposes, the burden to show error in the determination is on the lessee. Absent a showing of error, the determination of items of cost and revenue to be included in a manufacturing allowance are found to be correct.

When a lessee processes gas for recovery of liquid hydrocarbons, pursuant to 30 CFR 206.152 (1986) it must pay royalty either on the value of the wet gas before processing or the value of the residue gas after processing plus the value of the extracted liquids. The allowance which may not exceed two-thirds of the value of the liquids. When calculating the formula to be used for this purpose, it was error to include either the cost or value of processing condensate which was not derived from wet gas produced at the plant.

Transportation costs unrelated to the manufacturing process are not properly included in the formulation of a manufacturing allowance to be used in calculating the royalty value of natural gas.

When formulating a manufacturing allowance for purposes of calculating royalty, an allowance for expenses incidental to marketing ethane gas was properly denied. When calculating royalty pursuant to 30 CFR 206.150 (1986), the value of production shall not be less than fair market value, nor less than gross proceeds accruing from disposition of produced gas.

Mobil Oil Corp. & Mobil Exploration & Producing Services, Inc., 108 IBLA 216 (Apr. 19, 1986)

MMS is authorized to impose an interest charge where it determines that a royalty payor has failed to pay timely the proper amount of royalty due on the value of production of wet gas.

Where a royalty payor submits funds to MMS in response to a demand for alleged underpayments of royalties, and MMS subsequently refunds a portion of those funds, the payor is not entitled to interest on the refunded amount.

Phillips Petroleum Co., 109 IBLA 4 (May 23, 1989)

POTASSIUM LEASES AND PERMITS

GENERALLY

Regardless of any deficiency in the readjustment of a potassium lease, the matter will be entitled to repose under the doctrine of administrative finality in the absence of any timely objection by the lessee or the owner of an overriding royalty interest after notice of the readjustment and in the absence of any compelling legal or equitable reasons for further review.

Crescent Porter Hale Foundation, 108 IBLA 288 (Apr. 27, 1989)

LEASES

Pursuant to 43 CFR 3533.4(b), an applicant for a potassium preference right lease whose application is rejected by the Bureau of Land Management is entitled to a hearing before an Administrative Law Judge, if the applicant has alleged in the application facts the applicant believes to be sufficient to show entitlement to a lease.

Earth Sciences, Inc., 106 IBLA 313 (Jan. 6, 1989)

ROYALTIES

BLM may properly reduce the overriding royalty rate for a potassium lease pursuant to regulatory authority previously incorporated into the lease at the time of readjustment, notwithstanding the fact that the rate was originally established prior to the original promulgation of that regulatory authority.

Crescent Porter Hale Foundation, 108 IBLA 288 (Apr. 27, 1989)

POWERSITE LANDS

Under the preliminary injunction order issued in Nat'l Wildlife Federation v. Burford, Civ. No. 85-2238 (D.D.C. Feb. 10, 1986), BLM was precluded from terminating powersite classifications and restoring lands described in a desert land entry application.

James A. Malesky (On Reconsideration), 106 IBLA 327 (Jan. 9, 1989)

PUBLIC LANDS

GENERALLY

Where land has been conveyed to the United States reserving to the grantors the exclusive right to prospect for and exploit the oil and gas underlying the land and that reservation has been extended beyond its initial term by production, in accordance with the terms of the deed, the United States has, during the extended term, no interest in any of that oil and gas sufficient to form the basis for claiming compensatory royalty because of drainage.

Doris Slaaten, 107 IBLA 16 (Jan. 25, 1989)

An island, whether located in navigable or non-navigable waters, that is omitted from a survey remains public domain and may be surveyed and disposed of by the United States.

Olive Wheeler, 108 IBLA 296 (Apr. 27, 1989)

ALASKA

Pursuant to sec. 3(c) of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1602(e) (1982), BLM may properly exclude from an interim conveyance land which was used seasonally in connection with the administration of a Federal installation during the period of time that the land was available for selection by a Native village corporation, regardless of the amount of use occurring after the appropriate selection period.

Ahtna, Inc., 107 IBLA 266 (Feb. 23, 1989)

PUBLIC LANDS--Continued

JURISDICTION OVER

The Southern Pacific Transportation Co.'s interest in railroad rights-of-way granted to it pursuant to the General Railroad Right-of-Way Act of Mar. 3, 1875, ch. 152, 18 Stat. 482, 43 U.S.C. §§ 934-939 (1982), and the Act of July 27, 1866, Ch. 278, 14 Stat. 292, are sufficient to enable it to authorize another company to install a fiber optic communication system on the surface in the subsurface of such rights-of-way where they cross public lands, without either a consent or a right-of-way grant from the Bureau of Land Management.

Proposed Installation of MCI Fiber Optic Communications Line within Southern Pacific Transportation Co.'s Railroad Right-of-Way, M-36964 (Jan. 5, 1989)
96 I.D. 439

An Alaska Native allotment which has not automatically vested pursuant to ANILCA is properly adjudicated under the Act of May 17, 1906. The question of the validity of the application is separate and apart from the issue of the ownership of the lands named in the application, and the Department has the jurisdiction to address this question, even though the lands described in the application, may have been congressionally conveyed to another party. The Department had an ongoing trust obligation to Alaska Natives, and therefore retains jurisdiction to determine the validity of the Native allotment application. This action is necessary in order to determine whether it is necessary for the Department to take action to recover the land for the benefit of the Native applicant.

Kootznoowoo, Inc. v. Heirs of Jimmie Johnson, 109 IBLA 128 (June 8, 1989)

The effect of issuing a Native Allotment, like the issuance of patent, is to transfer the legal title from the United States and to remove the Department's jurisdiction to resolve conflicts concerning rights to the land.

The Bureau of Land Management's approval of a Native allotment application vests equitable title, but does not vest legal title. This equitable title is susceptible of being administratively modified or revoked by the Department if, prior to issuance of a Native Allotment, the Department finds that the land in

PUBLIC LANDS--Continued

JURISDICTION OVER--Continued

question, or any part of it, was not vacant, unappropriated, and unreserved nonmineral land during the period of the applicant's use and occupancy.

Ramona Field, 110 IBLA 367 (Sept. 14, 1989)

RIPARIAN RIGHTS

An island, whether located in navigable or nonnavigable waters, that is omitted from a survey remains public domain and may be surveyed and disposed of by the United States.

Olive Wheeler, 108 IBLA 296 (Apr. 27, 1989)

PUBLIC SALES

GENERALLY

BLM's failure to send a notice to the co-owner of an adjoining parcel of land as required by 43 CFR 2711.1-2(a) will not vitiate a public sale of the parcel by modified competitive bidding procedure where the co-owner had actual knowledge of the sale prior to the sale date and subsequently participated in the sale.

Stephen J. Stagnaro et al., 107 IBLA 323 (Mar. 8, 1989)

Under the provisions of 43 CFR 2711.3-3(d) and 43 CFR 2711.3-1(f) and (g), a direct sale of public land may not, as a general rule, be cancelled after BLM has accepted the tender of the purchase price.

"Adjoining landowners." The term "adjoining landowners," as used in 43 CFR 2711.1-2(b), does not include individuals who own cornering lands, since in the administration of the public land laws the terms "contiguous" or "adjoining" have been consistently defined and construed to exclude "cornering" lands.

Henry J. Warmuth, 108 IBLA 130 (Apr. 3, 1989)

PUBLIC SALES--Continued

CANCELLATION

Under the provisions of 43 CFR 2711.3-3(d) and 43 CFR 2711.3-1(f) and (g), a direct sale of public land may not, as a general rule, be cancelled after BLM has accepted the tender of the purchase price.

Henry J. Warmuth, 108 IBLA 130 (Apr. 3, 1989)

PREFERENCE RIGHTS

The failure of a high bidder to include proof of United States citizenship with a sealed bid is a curable defect not requiring rejection of a bid submitted pursuant to modified competitive bidding procedures.

Stephen J. Stagnaro et al., 107 IBLA 323 (Mar. 8, 1989)

RAILROAD GRANT LANDS

An application for patent filed on behalf of the successor-in-interest to the grantee, as innocent purchaser for value from the railroad, pursuant to sec. 321(b) of the Transportation Act of 1940, is properly rejected when the land was known to be mineral in character at the time of conveyance, because title to land known to be mineral in character did not pass pursuant to the railroad grant statutes. If the applicant disputes this finding, a hearing is ordinarily required.

Lloyd D. Hayes, 108 IBLA 189 (Apr. 13, 1989)

REGULATIONS

GENERALLY

When regulations governing assessments for erroneous reporting of sales and royalty remittance information have been amended to allow lower assessments, the Board may apply those regulations, absent

REGULATIONS--Continued

GENERALLY--Continued

intervening rights or countervailing public policy reasons, where to do so will benefit the appellant.

Forest Oil Corp., 107 IBLA 1 (Jan. 23, 1989)

An essential element of a claim for estoppel is that the party asserting it must be ignorant of the true facts. Since, however, all persons are presumed to have knowledge of relevant statutory and regulatory provisions, estoppel will not lie when the legal consequences of an action are clearly set forth in statute and/or regulation.

Terra Resources, Inc., 107 IBLA 10 (Jan. 24, 1989)

The setting of an operation and maintenance rate for an Indian irrigation project, pursuant to 25 U.S.C. § 385 (1982), is rulemaking within the meaning of 5 U.S.C. § 551(4) and (5) (1982).

When it appears that the Bureau of Indian Affairs has not concluded a rulemaking proceeding, the matter will be remanded for completion.

Joint Board of Control for the Flathead, Mission, & Jocko Irrigation Districts v. Area Director, Portland Area Office, Bureau of Indian Affairs, 17 IBIA 65 (Feb. 15, 1989)

The Board of Indian Appeals does not have authority to declare a duly promulgated Departmental regulation invalid.

Utu Utu Gwaitu Paiute Tribe of the Benton Paiute Reservation v. Sacramento Area Director, Bureau of Indian Affairs, 17 IBIA 141 (June 19, 1989)

REGULATIONS--Continued

GENERALLY--Continued

Where, during the pendency of an appeal from a denial of a cultural resource use permit, new regulations are promulgated establishing review procedures for challenging the denial of an application for a cultural resource use permit, the Board may set aside the decision under appeal and remand for application of those procedures.

Jicarilla Archaeological Services, 110 IBLA 57 (July 13, 1989)

The regulations at 43 CFR 2801.4 provide that a right-of-way grant issued on or before Oct. 21, 1976, shall be covered by the regulations in 43 CFR Part 2800. In turn, 43 CFR 2803.1-2(c)(1) provides, with limited exceptions, that an annual rental payment must be submitted in accordance with the per-acre rental schedule set out therein. A proposed per-acre rental schedule by state, county, and type of linear right-of-way use was published in the Federal Register, and comments were sought. The final rules, also published in the Federal Register, set out a county-by-county rental schedule. Rules and regulations reasonably adapted to the administration of a congressional act, not inconsistent with any statute, have the force and effect of law, and this Board has no authority to declare such rules and regulations invalid. There being no showing that the Department exceeded its statutory authority when setting the rental rate, this Board is obligated to accept the use of those rates. BLM's decision to use rate zones and its use of the rental schedule as the basis for calculating the rental obligations were proper.

Tucson Electric Power Co., 111 IBLA 69 (Sept. 22, 1989)

APPLICABILITY

When oil and gas leases are issued pursuant and subject to all regulations of the Secretary "now or hereafter in force," the Secretary is not limited to

REGULATIONS--Continued

APPLICABILITY--Continued

enforcing only those regulations in effect at the time of lease execution.

Coastal Oil and Gas Corp., et al., 108 IBLA 62 (Mar. 22, 1989)

BLM may properly reduce the overriding royalty rate for a potassium lease pursuant to regulatory authority previously incorporated into the lease at the time of readjustment, notwithstanding the fact that the rate was originally established prior to the original promulgation of that regulatory authority.

Crescent Porter Hale Foundation, 108 IBLA 288 (Apr. 27, 1989)

A regulation requiring an increased rental rate of $2 per acre for reinstated leases found to be within a KGS which was not in effect at the time a lease was reinstated does not become a provision of the reinstated lease and does not apply to the lease.

Dyco Petroleum Corp., 108 IBLA 366 (May 16, 1989)

FORCE AND EFFECT AS LAW

The MMS Payor's Handbook lacks the force and effect of law.

Mesa Petroleum Co., 107 IBLA 184 (Feb. 14, 1989)

The Board of Land Appeals has no authority to declare invalid duly promulgated regulations of the Department; such regulations have the force and effect of law and are binding on the Department. Sec. 3472.1-2(e) of 43 CFR was "duly promulgated" and, accordingly, has binding force and effect of law. Further, this provision is amply authorized by relevant provisions of the Mineral Leasing Act.

The intent of the proviso in a Federal coal lease that it is "pursuant and subject to the terms

FORCE AND EFFECT AS LAW--Continued

and provisions of the [Mineral Leasing Act], and to all reasonable regulations of the Secretary of the Interior, now or hereafter in force which are made a part hereof" is to incorporate future regulations, even though inconsistent with those in effect at the time of execution of the lease under the Mineral Leasing Act, and even though to do so creates additional obligations or burdens for the lessee. The implementation of the burden imposed by 43 CFR 3472.1-2(e)(1)(i) is consistent with the enforcement of the congressionally imposed obligation to develop Federal coal leases.

Veola & Aaron Rasmussen, 109 IBLA 106 (June 7, 1989)

The Department has provided by regulation that the terms of a Federal coal lease committed to an LMU, except for the royalty rate, shall be amended to be consistent with the stipulations of the LMU. The Department is bound by its regulations and a decision effectively amending the royalty rate by barring a credit of rental against royalty for a pre-Federal Coal Leasing Amendments Act lease committed to an LMU will be reversed as unsupported by the regulation.

Black Butte Coal Co., et al., 109 IBLA 254 (June 16, 1989)

A BLM instruction memorandum is merely a document for internal use by BLM employees. Such documents are not regulations and have no legal force and effect.

Cities Service Oil & Gas Corp., 109 IBLA 322 (June 21, 1989)

The Board of Land Appeals has no authority to declare invalid duly promulgated regulations of this Department. Such regulations have the force and effect of law and are binding on the Department.

Coastal States Energy Co., 110 IBLA 179 (Aug. 15, 1989)

INTERPRETATION

Where, during the pendency of an appeal from a denial of a cultural resource use permit, new regulations are promulgated establishing review procedures for challenging the denial of an application for a cultural resource use permit, the Board may set aside the decision under appeal and remand for application of those procedures.

Jicarilla Archaeological Services, 110 IBLA 57 (July 13, 1989)

The Board of Indian Appeals is not a court of general jurisdiction and has only those powers delegated to it by the Secretary of the Interior. It has not been delegated authority to award money damages against officials of the Bureau of Indian Affairs for their incorrect interpretation of regulations.

Esthervon (Kee) Spencer v. Navajo Area Director, Bureau of Indian Affairs, 17 IBIA 226 (Aug. 17, 1989)

The procedures set forth at 30 CFR 250.70 - 250.80 (1987) only apply in those cases involving the assessment of a civil penalty.

Transco Exploration Co. & TXP Operating Co., 110 IBLA 282 (Sept. 13, 1989) 96 I.D. 367

VALIDITY

The Board of Indian Appeals does not have authority to declare invalid a duly promulgated Departmental regulation.

Joint Board of Control for the Flathead, Mission, & Jocko Irrigation Districts v. Area Director, Portland Area Office, Bureau of Indian Affairs, 17 IBIA 65 (Feb. 15, 1989)

REGULATIONS--Continued

VALIDITY--Continued

While the Board of Land Appeals has no authority to declare invalid duly promulgated regulations of this Department which have the force and effect of law, the Board will consider a challenge to Departmental regulations insofar as it is alleged that the regulations were not "duly promulgated."

Regulations of the Department implementing 1976 Federal Coal Leasing Amendments Act amendments to the Mineral Leasing Act are duly promulgated in accordance with the requirements of Exec. Order No. 12291 and the Regulatory Flexibility Act.

GeoResources, Inc., 107 IBLA 311 (Mar. 2, 1989)
96 I.D. 77

The Board of Land Appeals has no authority to declare invalid duly promulgated regulations of the Department; such regulations have the force and effect of law and are binding on the Department. Sec. 3472.1-2(e) of 43 CFR was "duly promulgated" and, accordingly, has binding force and effect of law. Further, this provision is amply authorized by relevant provisions of the Mineral Leasing Act.

The intent of the proviso in a Federal coal lease that it is "pursuant and subject to the terms and provisions of the [Mineral Leasing Act], and to all reasonable regulations of the Secretary of the Interior, now or hereafter in force which are made a part hereof" is to incorporate future regulations, even though inconsistent with those in effect at the time of execution of the lease under the Mineral Leasing Act, and even though to do so creates additional obligations or burdens for the lessee. The implementation of the burden imposed by 43 CFR 3472.1-2(e)(1)(i) is consistent with the enforcement of the congressionally imposed obligation to develop Federal coal leases.

Veola & Aaron Rasmussen, 109 IBLA 106 (June 7, 1989)

REGULATIONS--Continued

VALIDITY--Continued

The Board of Land Appeals has no authority to declare invalid duly promulgated regulations of this Department. Such regulations have the force and effect of law and are binding on the Department.

Coastal States Energy Co., 110 IBLA 179 (Aug. 15, 1989)

While the Board of Land Appeals has no authority to declare invalid duly promulgated regulations of this Department which have the force and effect of law, the Board will consider a challenge to Departmental regulations insofar as it is alleged that the regulations were not "duly promulgated."

Promulgation of 43 CFR 3550 (1986) pursuant to sec. 21 of the Mineral Leasing Act, as amended by the Combined Hydrocarbon Leasing Act of 1981, 30 U.S.C. § 241 (1982), establishing a dual competitive/noncompetitive leasing system for gilsonite, was within the Secretary's discretion pursuant to sec. 21 of the Act, is reasonably adopted to the administration of the Act, is not inconsistent with it, and has the force and effect of law.

American Gilsonite, 111 IBLA 1 (Sept. 19, 1989)
96 I.D. 408

The regulations at 43 CFR 2801.4 provide that a right-of-way grant issued on or before Oct. 21, 1976, shall be covered by the regulations in 43 CFR Part 2800. In turn, 43 CFR 2803.1-2(c)(1) provides, with limited exceptions, that an annual rental payment must be submitted in accordance with the per-acre rental schedule set out therein. A proposed per-acre rental schedule by state, county, and type of linear right-of-way use was published in the Federal Register, and comments were sought. The final rules, also published in the Federal Register, set out a county-by-county rental schedule. Rules and regulations reasonably adapted to the administration of a congressional act, not inconsistent with any statute, have the force and effect of law, and this Board has no authority to declare such rules and regulations invalid. There being no showing that the Department exceeded its statutory authority when setting the rental rate, this Board is obligated to accept the use of those rates. BLM's decision to use rate zones and its use of the rental schedule as

the basis for calculating the rental obligations were proper.

Tucson Electric Power Co., 111 IBLA 69 (Sept. 22, 1989)

RENT

Where BLM has set the annual rental charges for a communications site right-of-way based on an appraisal of the fair market rental value of that site which failed, without adequate justification, to consider a comparable lease of arguable significance, the Board will set aside the decision setting the rental charges and remand for a reappraisal and any necessary recalculation of such charges.

Richard Boulais, dba Private Line Communications, 107 IBLA 109 (Feb. 2, 1989)

Where the reasonable rental value of Government-furnished quarters has been determined in accordance with accepted appraisal procedures pursuant to Departmental directives, and the occupants allege that the rent is unjust, the burden is upon them to prove by positive, specific, and substantial evidence that the appraisal is in error.

In the Matter of the Quarters Rental Rate Appeals of Employees Living at the Glenwood Ranger Station, 8 OHA 53 (Apr. 18, 1989)

In the Matter of the Quarters Rental Rate Appeals of Michael P. Whitelaw, Linda G. Brown, Joseph L. Finley, Bill Schoenleber, & Richard Arnoux, 8 OHA 74 (June 20, 1989)

Where the reasonable rental value of Government-furnished quarters has been determined in accordance with accepted appraisal procedures pursuant to Departmental directives, and the occupant alleges that the rent is unjust, the burden is upon the occupant to prove by positive, specific, and substantial evidence that the appraisal is in error.

In the Matter of the Quarters Rental Rate Appeal of Mr. James K. Steele, 8 OHA 60 (May 11, 1989)

RES JUDICATA

The principle of res judicata and its administrative counterpart, the doctrine of administrative finality, precludes reconsideration of a decision of a Departmental official in the absence of compelling legal or equitable reasons when a party or his predecessor-in-interest had an opportunity to obtain review within the Department and took no action. An appeal is properly dismissed where appellant is reapplying for patent 24 years after the prior application was rejected by final Departmental decision.

Lloyd D. Hayes, 108 IBLA 189 (Apr. 13, 1989)

Regardless of any deficiency in the readjustment of a potassium lease, the matter will be entitled to repose under the doctrine of administrative finality in the absence of any timely objection by the lessee or the owner of an overriding royalty interest after notice of the readjustment and in the absence of any compelling legal or equitable reasons for further review.

Crescent Porter Hale Foundation, 108 IBLA 288 (Apr. 27, 1989)

The Board will affirm a BLM decision finding land proper for selection by the State of Alaska in the face of an appeal challenging that decision on the basis that the appellants have a superior interest in the land by virtue of a prior homestead entry where final proof submitted in support of that entry was rejected

RES JUDICATA--Continued

by BLM with administrative finality and appellants have not demonstrated that the rejection was erroneous.

Estate of Sam McGee & Alice Jo McGee-Ward-Pritchard, 108 IBLA 375 (May 19, 1989)

OSMRE will not be deemed collaterally estopped from issuing a notice of violation and cessation order for the failure to eliminate all highwalls in violation of sec. 515(b)(3) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1265(b)(3) (1982), where the State and Federal enforcement actions did not arise from the same operative facts.

Cherry Hill Development v. Office of Surface Mining Reclamation & Enforcement, 110 IBLA 185 (Aug. 17, 1989)

RIGHTS-OF-WAY

GENERALLY

No violation of the National Environmental Policy Act of 1969 occurs upon BLM's issuance of a right-of-way authorizing construction of an all-weather road through the wintering habitat of an elk herd if the environmental impact statement accompanying this action adequately describes the impacts of such road, as mitigated by a seasonal road closure adopted as a part of the right-of-way grant.

The Shoshone-Bannock Tribes, The Wilderness Society et al., 108 IBLA 198 (Apr. 17, 1989)

This Board will affirm a BLM decision consenting to directional drilling of an oil and gas well spudded on state lands, drilled through lands described in a Federal lease, and bottomed on private lands when there is a showing that the consent is conditioned upon taking steps to prevent unnecessary or unreasonable interference with the right of the Federal lessee.

M. J. Harvey, Jr., 109 IBLA 31 (May 25, 1989)

RIGHTS-OF-WAY--Continued

GENERALLY--Continued

The regulations at 43 CFR 2801.4 provide that a right-of-way grant issued on or before Oct. 21, 1976, shall be covered by the regulations in 43 CFR Part 2800. In turn, 43 CFR 2803.1-2(c)(1) provides, with limited exceptions, that an annual rental payment must be submitted in accordance with the per-acre rental schedule set out therein. A proposed per-acre rental schedule by state, county, and type of linear right-of-way use was published in the Federal Register, and comments were sought. The final rules, also published in the Federal Register, set out a county-by-county rental schedule. Rules and regulations reasonably adapted to the administration of a congressional act, not inconsistent with any statute, have the force and effect of law, and this Board has no authority to declare such rules and regulations invalid. There being no showing that the Department exceeded its statutory authority when setting the rental rate, this Board is obligated to accept the use of those rates. BLM's decision to use rate zones and its use of the rental schedule as the basis for calculating the rental obligations were proper.

When setting the yearly rentals for existing linear rights-of-way not previously subject to the rental schedule set out at 43 CFR 2803.1-2(c)(1)(i), the regulatory provisions found at 43 CFR 2803.1-2(c)(2)(ii) require a rental adjustment if the new rental exceeds $100 and is more than a 100-percent increase over the current rental. The amount of the increase in excess of the 100-percent increase must be phased in by equal increments, plus the annual adjustment, over a 3-year period. A BLM decision establishing a new rental rate for a linear right-of-way, and using the rate schedule for the first time, will be set aside and remanded if BLM fails to phase in the amount of the rental increase in excess of 100 percent of the current rental pursuant to 43 CFR 2803.1-2(c)(2)(ii).

Tucson Electric Power Co., 111 IBLA 69 (Sept. 22, 1989)

ACT OF JANUARY 27, 1866

The Southern Pacific Transportation Co.'s interest in railroad rights-of-way granted to it pursuant to the General Railroad Right-of-Way Act of Mar. 3, 1875, ch. 152, 18 Stat. 482, 43 U.S.C. §§ 934-939 (1982), and the Act of July 27, 1866, Ch. 278, 14 Stat. 292, are sufficient to enable it to authorize another company to install a fiber optic communication system on the surface in the subsurface of such rights-of-way where they cross public lands, without either a consent or a right-of-way grant from the Bureau of Land Management.

Proposed Installation of MCI Fiber Optic Communications Line within Southern Pacific Transportation Co.'s Railroad Right-of-Way, M-36964 (Jan. 5, 1989)
96 I.D. 439

ACT OF MARCH 3, 1875

The Southern Pacific Transportation Co.'s interest in railroad rights-of-way granted to it pursuant to the General Railroad Right-of-Way Act of Mar. 3, 1875, ch. 152, 18 Stat. 482, 43 U.S.C. §§ 934-939 (1982), and the Act of July 27, 1866, Ch. 278, 14 Stat. 292, are sufficient to enable it to authorize another company to install a fiber optic communication system on the surface in the subsurface of such rights-of-way where they cross public lands, without either a consent or a right-of-way grant from the Bureau of Land Management.

Proposed Installation of MCI Fiber Optic Communications Line within Southern Pacific Transportation Co.'s Railroad Right-of-Way, M-36964 (Jan. 5, 1989)
96 I.D. 439

ACT OF FEBRUARY 15, 1901

BLM may revoke or modify right-of-way grants issued under the Act of Feb. 15, 1901, where there is just cause to do so. Where the record shows that BLM seeks to modify a grant issued under the Act to permit public access to the public lands described in the grant, and that the public interest would be benefited

RIGHTS-OF-WAY--Continued

ACT OF FEBRUARY 15, 1901--Continued

by the proposed action, BLM's decision to modify the grant will be affirmed on appeal.

Ute Water Conservancy District, 106 IBLA 346 (Jan. 12, 1989)

ACT OF MARCH 4, 1911

Where BLM adjusts the annual rental for a telecommunications site right-of-way based on the comparable lease method of valuation and, following an informal hearing on the appraisal, abandons the appraisal in favor of a market data study of telecommunication site annual rental values, the decision establishing the rental on the basis of the market data study will be vacated and remanded for reappraisal, where the market study did not fully identify the lease transactions relied upon and BLM provided no analysis of how the right-of-way being appraised compared to any particular information in the market study.

Mountain States Telephone & Telegraph Co., 107 IBLA 82 (Jan. 31, 1989)

An appraisal of the fair market rental value of a right-of-way for a communications site may be set aside and remanded where the appraisal report provides insufficient data on leases compared and insufficient analysis of the differences and similarities between the comparable leases and the subject lease to support the appraisal.

Mountain States Telephone & Telegraph Co., 109 IBLA 142 (June 8, 1989)

The regulations at 43 CFR 2801.4 provide that a right-of-way grant issued on or before Oct. 21, 1976, shall be covered by the regulations in 43 CFR Part 2800. In turn, 43 CFR 2803.1-2(c)(1) provides, with limited exceptions, that an annual rental payment must be submitted in accordance with the per-acre rental schedule set out therein. A proposed per-acre rental schedule by state, county, and type of linear right-of-way use was published in the Federal Register, and comments

RIGHTS-OF-WAY--Continued

ACT OF MARCH 4, 1911--Continued

were sought. The final rules, also published in the Federal Register, set out a county-by-county rental schedule. Rules and regulations reasonably adapted to the administration of a congressional act, not inconsistent with any statute, have the force and effect of law, and this Board has no authority to declare such rules and regulations invalid. There being no showing that the Department exceeded its statutory authority when setting the rental rate, this Board is obligated to accept the use of those rates. BLM's decision to use rate zones and its use of the rental schedule as the basis for calculating the rental obligations were proper.

When setting the yearly rentals for existing linear rights-of-way not previously subject to the rental schedule set out at 43 CFR 2803.1-2(c)(1)(i), the regulatory provisions found at 43 CFR 2803.1-2(c)(2)(ii) require a rental adjustment if the new rental exceeds $100 and is more than a 100-percent increase over the current rental. The amount of the increase in excess of the 100-percent increase must be phased in by equal increments, plus the annual adjustment, over a 3-year period. A BLM decision establishing a new rental rate for a linear right-of-way, and using the rate schedule for the first time, will be set aside and remanded if BLM fails to phase in the amount of the rental increase in excess of 100 percent of the current rental pursuant to 43 CFR 2803.1-2(c)(2)(ii).

Tucson Electric Power Co., 111 IBLA 69 (Sept. 22, 1989)

ACT OF FEBRUARY 25, 1920

BLM may properly grant a right-of-way for a crude oil pipeline across a Federal oil and gas lease where BLM has adequately considered all relevant factors, including various alternative routes proposed by the lessee, and determined that only the selected route does not cross protected wetlands; that the selected route is consistent with BLM policy favoring the issuance of rights-of-way adjacent to existing facilities; and that the selected route does not, in any material

ACT OF FEBRUARY 25, 1920--Continued

respect, interfere with or diminish the rights granted to the lessee under its lease.

Arnell Oil Co., 110 IBLA 80 (July 26, 1989)

APPLICATIONS

BLM may properly grant a right-of-way for a crude oil pipeline across a Federal oil and gas lease where BLM has adequately considered all relevant factors, including various alternative routes proposed by the lessee, and determined that only the selected route does not cross protected wetlands; that the selected route is consistent with BLM policy favoring the issuance of rights-of-way adjacent to existing facilities; and that the selected route does not, in any material respect, interfere with or diminish the rights granted to the lessee under its lease.

Arnell Oil Co., 110 IBLA 80 (July 26, 1989)

APPRAISALS

BLM properly holds a communications site right-of-way grant for termination where the holder failed to pay the annual rental charges for the first and second years of the grant within 30 days following notification of BLM's determination of the fair market value of the grant for those years.

D. R. Johnson Lumber Co., 106 IBLA 379 (Jan. 19, 1989)

Where BLM adjusts the annual rental for a telecommunications site right-of-way based on the comparable lease method of valuation and, following an informal hearing on the appraisal, abandons the appraisal in favor of a market data study of telecommunication site annual rental values, the decision establishing the rental on the basis of the market data study will be vacated and remanded for reappraisal, where the market study did not fully identify the lease transactions relied upon and BLM provided no analysis of how the right-of-way being

appraised compared to any particular information in the market study.

Mountain States Telephone & Telegraph Co., 107 IBLA 82 (Jan. 31, 1989)

Where BLM has set the annual rental charges for a communications site right-of-way based on an appraisal of the fair market rental value of that site which failed, without adequate justification, to consider a comparable lease of arguable significance, the Board will set aside the decision setting the rental charges and remand for a reappraisal and any necessary recalculation of such charges.

Richard Boulais, dba Private Line Communications, 107 IBLA 109 (Feb. 2, 1989)

The role of the Board of Indian Appeals in reviewing a Bureau of Indian Affairs determination of fair market value in connection with the taking of a road right-of-way over Indian land is to determine whether the decision is reasonable; that is, whether it is supported by law and substantial evidence.

When private property is taken by the United States, just compensation payable to the landowner is properly reduced by the value of benefits accruing to the landowner's remaining property as a result of the taking.

Utu Utu Gwaitu Paiute Tribe of the Benton Paiute Reservation v. Area Director, Sacramento Area Office, Bureau of Indian Affairs, 17 IBIA 78 (Feb. 22, 1989)

An appraisal of the fair market rental value of a right-of-way for a communications site may be set aside and remanded where the appraisal report provides insufficient data on leases compared and insufficient analysis of the differences and similarities between

RIGHTS-OF-WAY--Continued

APPRAISALS--Continued

the comparable leases and the subject lease to support the appraisal.

Mountain States Telephone & Telegraph Co., 109 IBLA 142 (June 8, 1989)

A BLM appraisal of a right-of-way for a compressor station will be affirmed on appeal where the right-of-way holder has not demonstrated that it was error for BLM to use a market survey of comparable transactions involving the issuance of private rights-of-way rather than the fee schedule for linear rights-of-way or the "before and after" appraisal method.

Colorado Interstate Gas Co., 110 IBLA 171 (Aug. 14, 1989)

The regulations at 43 CFR 2801.4 provide that a right-of-way grant issued on or before Oct. 21, 1976, shall be covered by the regulations in 43 CFR Part 2800. In turn, 43 CFR 2803.1-2(c)(1) provides, with limited exceptions, that an annual rental payment must be submitted in accordance with the per-acre rental schedule set out therein. A proposed per-acre rental schedule by state, county, and type of linear right-of-way use was published in the Federal Register, and comments were sought. The final rules, also published in the Federal Register, set out a county-by-county rental schedule. Rules and regulations reasonably adapted to the administration of a congressional act, not inconsistent with any statute, have the force and effect of law, and this Board has no authority to declare such rules and regulations invalid. There being no showing that the Department exceeded its statutory authority when setting the rental rate, this Board is obligated to accept the use of those rates. BLM's decision to use rate zones and its use of the rental schedule as the basis for calculating the rental obligations were proper.

When setting the yearly rentals for existing linear rights-of-way not previously subject to the rental schedule set out at 43 CFR 2803.1-2(c)(1)(i), the regulatory provisions found at 43 CFR 2803.1-2(c)(2)(ii) require a rental adjustment if the new rental exceeds $100 and is more than a 100-percent increase over the current rental. The amount of the

RIGHTS-OF-WAY--Continued

APPRAISALS--Continued

increase in excess of the 100-percent increase must be phased in by equal increments, plus the annual adjustment, over a 3-year period. A BLM decision establishing a new rental rate for a linear right-of-way, and using the rate schedule for the first time, will be set aside and remanded if BLM fails to phase in the amount of the rental increase in excess of 100 percent of the current rental pursuant to 43 CFR 2803.1-2(c)(2)(ii).

Tucson Electric Power Co., 111 IBLA 69 (Sept. 22, 1989)

CANCELLATION

BLM properly holds a communications site right-of-way grant for termination where the holder failed to pay the annual rental charges for the first and second years of the grant within 30 days following notification of BLM's determination of the fair market value of the grant for those years.

D. R. Johnson Lumber Co., 106 IBLA 379 (Jan. 19, 1989)

Under 43 CFR 2803.1-4, BLM is authorized to require the holder of a right-of-way grant to furnish a bond or other security satisfactory to BLM where necessary to secure compliance with the obligations imposed by the grant and applicable laws and regulations. Where the right-of-way holders have failed to comply with the restrictions of the grant (1) by constructing (without prior notice to or approval by BLM) a pipeline and catchment structure that did not conform to approved specifications and which is located in trespass outside the boundaries of the right-of-way, (2) by creating excessive surface disturbance both on and off the lands covered by the right-of-way, and (3) by disturbing a stream bed in violation of governing laws and regulations, and where it reasonably appears from statements by the holders that they do not intend to take corrective action, BLM properly demands that a performance bond be posted. Under 43 CFR 2803.4(b), BLM, following issuance of notice that the

RIGHTS-OF-WAY--Continued

CANCELLATION--Continued

bond is due, may terminate the right-of-way grant if the bond is not posted as directed.

Frank A. Keele, William C. Taylor, Van Taylor, 107 IBLA 296 (Mar. 1, 1989)

CONDITIONS AND LIMITATIONS

BLM may revoke or modify right-of-way grants issued under the Act of Feb. 15, 1901, where there is just cause to do so. Where the record shows that BLM seeks to modify a grant issued under the Act to permit public access to the public lands described in the grant, and that the public interest would be benefited by the proposed action, BLM's decision to modify the grant will be affirmed on appeal.

BLM may require the holder of a right-of-way grant for a municipal water-supply reservoir issued under the Federal Land Policy and Management Act of 1976 to open all parts of the reservoir for limited public access where the grant was conditioned on BLM's right to review at 5-year intervals whether the limited public access should be permitted on the reservoir provided that so doing was in the public interest and would not unduly burden the use of the land as a water-supply reservoir.

Ute Water Conservancy District, 106 IBLA 346 (Jan. 12, 1989)

Where issuance of a right-of-way for a dam and reservoir in an area likely to contain archaeological artifacts is conditioned upon a stipulation requiring the holder to assume the responsibility for testing and/or mitigation of impacts to sites discovered as a result of operations pursuant to the right-of-way, a decision requiring compliance with that stipulation will be affirmed on appeal.

A stipulation imposing liability on a right-of-way holder for mitigation of impacts to cultural resources discovered as a result of operations under the right-of-way will be enforced according to its terms. Where 90 percent of the land embraced in a cultural resources site discovered as a result of operations under a right-of-way is situated on public

CONDITIONS AND LIMITATIONS--Continued

land and/or private land outside the boundary of the right-of-way, the liability of the holder for mitigation expenses will be upheld for portions of the site within the right-of-way in the absence of language imposing liability for sites outside the right-of-way grant.

Water Users Ass'n No. 1, 108 IBLA 166 (Apr. 11, 1989)

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976

BLM may require the holder of a right-of-way grant for a municipal water-supply reservoir issued under the Federal Land Policy and Management Act of 1976 to open all parts of the reservoir for limited public access where the grant was conditioned on BLM's right to review at 5-year intervals whether the limited public access should be permitted on the reservoir provided that so doing was in the public interest and would not unduly burden the use of the land as a water-supply reservoir.

Ute Water Conservancy District, 106 IBLA 346 (Jan. 12, 1989)

Under 43 CFR 2803.1-4, BLM is authorized to require the holder of a right-of-way grant to furnish a bond or other security satisfactory to BLM where necessary to secure compliance with the obligations imposed by the grant and applicable laws and regulations. Where the right-of-way holders have failed to comply with the restrictions of the grant (1) by constructing (without prior notice to or approval by BLM) a pipeline and catchment structure that did not conform to approved specifications and which is located in trespass outside the boundaries of the right-of-way, (2) by creating excessive surface disturbance both on and off the lands covered by the right-of-way, and (3) by disturbing a stream bed in violation of governing laws and regulations, and where it reasonably appears from statements by the holders that they do not intend to take corrective action, BLM properly demands that a performance bond be posted. Under 43 CFR 2803.4(b), BLM, following issuance of notice that the

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

bond is due, may terminate the right-of-way grant if the bond is not posted as directed.

Frank A. Keele, William C. Taylor, Van Taylor, 107 IBLA 296 (Mar. 1, 1989)

Under sec. 504(g) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1764(g) (1982), the Secretary of the Interior may charge no rental for a right-of-way only in certain circumstances. The regulation implementing that provision, 43 CFR 2803.1-2(c) (1986), sets forth the circumstances under which BLM is authorized to charge no rental fee and specifically excludes from consideration municipal utilities and cooperatives whose principal source of revenue is customer charges, including a public corporation that develops, stores, and sells water at wholesale to other public water authorities.

Metropolitan Water District of Southern California, 109 IBLA 327 (June 22, 1989)

NATURE OF INTEREST GRANTED

The Southern Pacific Transportation Co.'s interest in railroad rights-of-way granted to it pursuant to the General Railroad Right-of-Way Act of Mar. 3, 1875, ch. 152, 18 Stat. 482, 43 U.S.C. §§ 934-939 (1982), and the Act of July 27, 1866, Ch. 278, 14 Stat. 292, are sufficient to enable it to authorize another company to install a fiber optic communication system on the surface in the subsurface of such rights-of-way where they cross public lands, without either a consent or a right-of-way grant from the Bureau of Land Management.

Proposed Installation of MCI Fiber Optic Communications Line within Southern Pacific Transportation Co.'s Railroad Right-of-Way, M-36964 (Jan. 5, 1989)

RIGHTS-OF-WAY--Continued

NATURE OF INTEREST GRANTED--Continued

Where a Native initiates use and occupancy of certain lands in 1938, but prior to the filing of an allotment application, highway and power transmission rights-of-way are sought from and granted by BLM across such lands, subject to valid existing rights, the later filing of the allotment application vests the inchoate preference right arising from the use and occupancy, and that right relates back to the initiation of the use and occupancy, thereby taking precedence over the intervening rights-of-way applications. The subsequent legislative approval of the Native allotment in accordance with sec. 905(a) of the Alaska National Interest Lands Conservation Act, 43 U.S.C. § 1634(a) (1982), precludes any inquiry into the Native's use and occupancy of the land, and the Native allotment is a valid existing right which is properly recognized by a declaration that the rights-of-way are null and void to the extent they cross lands within the allotment.

State of Alaska, Golden Valley Electric Ass'n, 110 IBLA 224 (Aug. 24, 1989)

Where a Native initiates use and occupancy of certain lands in 1937, but prior to the filing of an allotment application, a conflicting hot springs lease is issued and a public access trail was used to the hot springs, the later filing of the allotment application vests the inchoate preference right arising from the prior use and occupancy. That right relates back to the initiation of the use and occupancy, thereby taking precedence over the intervening hot springs lease and the use of the public access trail.

James E. Dawson, 111 IBLA 139 (Sept. 29, 1989)

OIL AND GAS PIPELINES

Where BLM issued a record of decision determining to issue a natural gas pipeline right-of-way and therein provides for a "30 days comment period" and in a notice of its decision also informs interested parties that the decision is subject to appeal, the Board will entertain a timely appeal of the decision where the record shows

RIGHTS-OF-WAY--Continued

OIL AND GAS PIPELINES--Continued

that BLM clearly was issuing a decision ripe for administrative review and the reference to a public comment period was inadvertent and unintended.

A determination that a proposed action will not have a significant impact on the quality of the human environment will be affirmed on appeal if the record establishes that a careful review of environmental problems has been made, relevant areas of environmental concern have been identified, and the final determination is reasonable. The party challenging a determination must show that the determination was premised on a clear error of law, a demonstrable error of fact, or that the analysis failed to consider a substantial question of material significance to the action for which the analysis was prepared. Mere differences of opinion provide no basis for reversal if BLM's decision is reasonable and supported by the record on appeal.

Hoosier Environmental Council, 109 IBLA 160 (June 8, 1989)

BLM may properly grant a right-of-way for a crude oil pipeline across a Federal oil and gas lease where BLM has adequately considered all relevant factors, including various alternative routes proposed by the lessee, and determined that only the selected route does not cross protected wetlands; that the selected route is consistent with BLM policy favoring the issuance of rights-of-way adjacent to existing facilities; and that the selected route does not, in any material respect, interfere with or diminish the rights granted to the lessee under its lease.

Arnell Oil Co., 110 IBLA 80 (July 26, 1989)

A BLM appraisal of a right-of-way for a compressor station will be affirmed on appeal where the right-of-way holder has not demonstrated that it was error for BLM to use a market survey of comparable transactions involving the issuance of private rights-of-way rather

OIL AND GAS PIPELINES--Continued

than the fee schedule for linear rights-of-way or the "before and after" appraisal method.

Colorado Interstate Gas Co., 110 IBLA 171 (Aug. 14, 1989)

REVISED STATUTES SEC. 2477

Under the regulation at 43 CFR 2804.1(b) decisions regarding rights-of-way under the regulations at 43 CFR Part 2800 are excepted from the automatic stay pending appeal provided by regulation at 43 CFR 4.21(a) and are effective pending appeal. No application was required for R.S. 2477 rights-of-way granted by statute for roads constructed over unreserved public lands and a decision finding no significant impact to adjacent public lands from improvement of an R.S. 2477 right-of-way is not a decision under the regulations at 43 CFR Part 2800 and, hence, is not excepted from the automatic stay pending appeal.

Sierra Club et al., 108 IBLA 381 (May 19, 1989)

The grant of a right-of-way under R.S. 2477 arose when a public highway over unreserved public lands was established pursuant to the laws of the jurisdiction where the land is located. A decision of BLM on judicial remand finding such a right-of-way exists will be affirmed where it is consistent with a ruling of the Federal court which is binding on the parties before the Board.

Where an R.S. 2477 right-of-way is found to exist across public lands for a county road bordering WSAs, the right to maintain and improve that right-of-way, measured by what is reasonable and necessary in light of preexisting uses of the road at the time of repeal of R.S. 2477, constitutes a valid existing right under FLPMA. Notwithstanding this limitation on the authority of BLM, the obligation of BLM under sec. 603(c) of FLPMA to manage the public lands so as to avoid unnecessary and undue degradation of WSAs may require preparation of an environmental assessment with respect to the impact of construction of road improvements proposed by the county to ascertain whether they may involve any unnecessary or undue degratdation to WSAs

REVISED STATUTES SEC. 2477--Continued

which would require preparation of an environmental impact statement.

Sierra Club et al., 111 IBLA 122 (Sept. 29, 1989)

RULES OF PRACTICE

GENERALLY

Under 25 CFR 88.1(c), a decision of a Bureau of Indian Affairs Area Director approving, disapproving, or conditionally approving a tribal attorney contract is final for the Department and is not subject to appeal with the Department.

Ronald T. Welch et al. v. Area Director, Minneapolis Area Office, Bureau of Indian Affairs, 17 IBIA 56 (Jan. 30, 1989)

"Last address of record." In the processing of an application for assignment of a coal lease, the last address of record for the purposes of 43 CFR 1810.2(b) is the address stated on the application unless the applicant or an authorized representative has filed written notice of a change of address. When an application is accompanied by a letter from the applicant's attorney which states that the attorney is to be contacted concerning certain matters, the attorney's address is the "last address of record," and delivery of a document to that address constitutes service of the document upon the applicant, regardless of whether it was actually received by the attorney. Where the address provided by the attorney does not specify a suite, office number, or floor, "delivery" of the document is accomplished when it is received in the building indicated in the address.

5M, Inc., 109 IBLA 334 (June 22, 1989)

RULES OF PRACTICE--Continued

GENERALLY--Continued

Pursuant to 30 CFR 290.7 any party adversely affected by a final decision of the Director, Minerals Management Service, may file an appeal with the Board. Where the issues raised before the Board were not raised before the Director, the appeal must be dismissed for lack of jurisdiction.

ANR Production Co., 110 IBLA 127 (Aug. 8, 1989)

The procedures set forth at 30 CFR 250.70-250.80 (1987) only apply in those cases involving the assessment of a civil penalty.

Where an oil and gas lessee has entered into a seller's representative agreement and designated the operator of the lease as its representative for the tender of royalty payments to the United States, service of documents relating to those payments on the operator constitutes effective service upon the lessee.

Transco Exploration Co. & TXP Operating Co., 110 IBLA 282 (Sept. 13, 1989) 96 I.D. 367

Where an adverse party files an untimely motion for extension of time within which to file an answer, the Board of Land Appeals may, in its discretion, grant the motion pursuant to 43 CFR 4.22(f).

American Gilsonite, 111 IBLA 1 (Sept. 19, 1989) 96 I.D. 408

APPEALS

Generally

Where a decision of the Director, Minerals Management Service, is approved by an Assistant Secretary, the decision is final for the Department and the Board of Land Appeals lacks jurisdiction to review either the substance thereof or the procedures followed in issuing the decision.

Marathon Oil Co., 108 IBLA 177 (Apr. 12, 1989)

RULES OF PRACTICE--Continued

APPEALS--Continued

Generally--Continued

Where on appeal from a BLM decision rejecting a Native allotment application because the application was not pending before the Department on Dec. 18, 1971, the Board determines that there is a question of fact whether the application was pending on that date, the Board will set aside the BLM decision and refer the case for a hearing before an Administrative Law Judge.

June I. Degnan, 108 IBLA 282 (Apr. 26, 1989)

Where BLM issued a record of decision determining to issue a natural gas pipeline right-of-way and therein provides for a "30 days comment period" and in a notice of its decision also informs interested parties that the decision is subject to appeal, the Board will entertain a timely appeal of the decision where the record shows that BLM clearly was issuing a decision ripe for administrative review and the reference to a public comment period was inadvertent and unintended.

Hoosier Environmental Council, 109 IBLA 160 (June 8, 1989)

Where, during the pendency of an appeal from a denial of a cultural resource use permit, new regulations are promulgated establishing review procedures for challenging the denial of an application for a cultural resource use permit, the Board may set aside the decision under appeal and remand for application of those procedures.

Jicarilla Archaeological Services, 110 IBLA 57 (July 13, 1989)

Except in areas under wilderness review, mining plans of operations become effective immediately upon the approval pursuant to provision of 43 CFR 3809.4(b). This regulatory provision makes approval of a mining plan of operations a final Departmental action immediately subject to judicial review.

The Wilderness Society, 110 IBLA 67 (July 20, 1989)

APPEALS--Continued

Generally--Continued

Where MMS issues an order requiring the submission of additional past royalties and thereafter denies a request from the lessee that it be permitted to post a bond in lieu of tendering the money during the pendency of an appeal, the failure of the lessee to appeal from the decision of MMS denying the request to post a bond and the subsequent tender of the amount demanded constitutes a waiver of any objection to the requirement that the money be tendered during the pendency of the appeal.

Transco Exploration Co. & TXP Operating Co., 110 IBLA 282 (Sept. 13, 1989) 96 I.D. 367

Answers

Where an adverse party files an untimely motion for extension of time within which to file an answer, the Board of Land Appeals may, in its discretion, grant the motion pursuant to 43 CFR 4.22(f).

American Gilsonite, 111 IBLA 1 (Sept. 19, 1989) 96 I.D. 408

Burden of Proof

A holder of a noncompetitive oil and gas lease who challenges a determination that certain lands are within the known geologic structure of a producing oil or gas field has the burden of establishing that the determination is in error. Where the record establishes that the Secretary's technical expert has made a reasoned analysis of the available geological data, the Secretary is entitled to rely upon his expert's professional opinion, absent a showing of error by a preponderance of the evidence.

Celeste C. Grynberg, 107 IBLA 143 (Feb. 7, 1989)

RULES OF PRACTICE--Continued

APPEALS--Continued

Burden of Proof--Continued

The Department is entitled to rely on the reasoned analysis of its technical experts in matters within the realm of their expertise. If BLM supports a decision regarding the volume of gas avoidably lost by an operator with sufficient evidence to demonstrate a rational basis for that decision and that the decision was made in a careful and systematic manner, using the advice of such experts, the decision will not be rejected without a showing of error. The party challenging the decision has the burden of showing by a preponderance of the evidence that the determination is erroneous.

Mallon Oil Co., 107 IBLA 150 (Feb. 10, 1989)

A holder of a noncompetitive oil and gas lease who challenges a determination that certain lands are within the known geologic structure of a producing oil or gas field has the burden of establishing that the determination is in error. Where the record establishes that the Secretary's technical expert has made a reasoned analysis of the available geological data, the Secretary is entitled to rely upon his expert's professional opinion, absent a showing of error by a preponderance of the evidence.

John R. Stamper, BHP Petroleum (Americas), Inc., 110 IBLA 130 (Aug. 9, 1989)

Dismissal

An administrative appeal must be filed within 30 days of receipt of the decision from which an appeal is taken. 43 CFR 411. The timely filing of an administrative appeal is jurisdictional and the failure to file timely mandates dismissal of the appeal.

D. R. Johnson Lumber Co., 106 IBLA 379 (Jan. 19, 1989)

RULES OF PRACTICE--Continued

APPEALS--Continued

Dismissal--Continued

A party who is adversely affected by a decision of an officer of BLM may appeal that decision to the Board of Land Appeals. However, a notice of appeal must be filed with BLM within 30 days after the date of service. The timely filing of a notice of appeal is jurisdictional. The failure to file within the time allowed renders the decision final and requires dismissal of the appeal.

Stewart L. Ashton, 107 IBLA 140 (Feb. 6, 1989)

The Board will not dismiss as moot an appeal from a BLM decision approving an application for a permit to drill within a designated resource protection zone surrounding units of the Hovenweep National Monument, even though the well has been drilled, plugged, and abandoned, where the appeal presents a significant issue regarding the adequacy of BLM's assessment of the environmental impact of approving the application, and the record indicates the issue is likely to recur within the protection zone.

Colorado Environmental Coalition et al., 108 IBLA 10 (Mar. 20, 1989)

The principle of res judicata and its administrative counterpart, the doctrine of administrative finality, precludes reconsideration of a decision of a Departmental official in the absence of compelling legal or equitable reasons when a party or his predecessor-in-interest had an opportunity to obtain review within the Department and took no action. An appeal is properly dismissed where appellant is reapplying for patent 24 years after the prior application was rejected by final Departmental decision.

Lloyd D. Hayes, 108 IBLA 189 (Apr. 13, 1989)

RULES OF PRACTICE--Continued

APPEALS--Continued

Dismissal--Continued

Where the Director, MMS, issues a decision in which he reserves the right to conduct further audits of certain Federal oil and gas leases and processing plants, the royalty payor is not adversely affected and, therefore, lacks standing to appeal that declaration.

Phillips Petroleum Co., 109 IBLA 4 (May 23, 1989)

Where, on appeal from a denial of a protest, an appellant fails to make an adequate showing how any legally cognizable interest has been adversely affected by the denial of the protest, such an appellant will be deemed to lack standing to appeal and the appeal will be dismissed.

Colorado Open Space Council, Sierra Club, 109 IBLA 274 (June 20, 1989)

The time for filing a request for a hearing with respect to issuance of a surface mining permit under sec. 514(c) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1264(c) (1982), is limited by the terms of the statute and the regulation at 30 CFR 775.11(a) to 30 days from the time the applicant is notified of the decision of the regulatory authority on the permit application. The timely filing of a request for hearing is essential to establish the jurisdiction of the Office of Hearings and Appeals to review a permit decision and a decision dismissing the appeal will be affirmed where it appears from the record that the request was not filed within the time limit.

An appeal will ordinarily be dismissed as moot where, as a result of events occurring after the appeal is filed, there is no effective relief which the Board can afford the appellant.

The Hopi Tribe v. Office of Surface Mining Reclamation & Enforcement, 109 IBLA 374 (June 23, 1989)

APPEALS--Continued

Dismissal--Continued

Departmental regulation 43 CFR 4.411 provides that a person served with the decision being appealed must transmit the notice of appeal in time for it to be filed in the office where it is required to be filed within 30 days after the date of service. If a decision is published in the Federal Register, a person not served with the decision must transmit a notice of appeal in time for it to be filed within 30 days after the date of publication. If a decision is not published in the Federal Register and an appeal is brought by a person who is not served with the decision, the appellant must establish that he was entitled to personal service of the decision or that his appeal was filed within 30 days after service of the decision upon the party or parties of record.

Lew Landers, 109 IBLA 391 (June 26, 1989)

Pursuant to 30 CFR 290.7 any party adversely affected by a final decision of the Director, Minerals Management Service, may file an appeal with the Board. Where the issues raised before the Board were not raised before the Director, the appeal must be dismissed for lack of jurisdiction.

ANR Production Co., 110 IBLA 127 (Aug. 8, 1989)

An appeal from a BLM decision dismissing a protest of a BLM dependent resurvey which did not affect any corner or line separating Federal from the protestant's private land will be dismissed where the protestants were not adversely affected by the decision.

Wilogene Simpson et al., 110 IBLA 271 (Sept. 13, 1989)

Effect of

Application for approval by the Bureau of Land Management of an assignment of record title to an oil and gas lease is made by the assignee of the lease. An assignment filed in conformance with the applicable law and regulations ordinarily requires approval by

RULES OF PRACTICE--Continued

APPEALS--Continued

Effect of--Continued

the Department as to qualifications of the assignee and sufficiency of a bond.

Ernhart, Inc., Thomas Hope, Jr., 108 IBLA 267 (Apr. 25, 1989)

Under the regulation at 43 CFR 2804.1(b) decisions regarding rights-of-way under the regulations at 43 CFR Part 2800 are excepted from the automatic stay pending appeal provided by regulation at 43 CFR 4.21(a) and are effective pending appeal. No application was required for R.S. 2477 rights-of-way granted by statute for roads constructed over unreserved public lands and a decision finding no significant impact to adjacent public lands from improvement of an R.S. 2477 right-of-way is not a decision under the regulations at 43 CFR Part 2800 and, hence, is not excepted from the automatic stay pending appeal.

Sierra Club et al., 108 IBLA 381 (May 19, 1989)

Extensions of Time

Where an adverse party files an untimely motion for extension of time within which to file an answer, the Board of Land Appeals may, in its discretion, grant the motion pursuant to 43 CFR 4.22(f).

American Gilsonite, 111 IBLA 1 (Sept. 19, 1989)
96 I.D. 408

Failure to Appeal

Under 43 CFR 4.410, the timely filing of a notice of appeal is necessary to establish jurisdiction over a matter. Failure to file a timely appeal has the result that a decision becomes final action for the Department, and the Board will not consider the validity of such decisions in a later appeal. The failure to file a timely appeal from decisions declaring mining claims

RULES OF PRACTICE--Continued

APPEALS--Continued

Failure to Appeal--Continued

abandoned and void precludes the Board from considering the validity of the claims in an appeal from the rejection of a patent application for those claims.

U. A. Small, 108 IBLA 102 (Mar. 29, 1989)

If the successful bidder for a competitive oil and gas lease elected to execute a special stipulation required by BLM rather than appealing the decision requiring the stipulation, failure to appeal that decision renders it final and precludes the lessee from contending, in a later appeal brought from action by BLM enforcing the stipulation, that the requirement was not properly imposed.

George A. Haddad, Jr., 109 IBLA 394 (June 26, 1989)

The failure to file a timely appeal from a decision by an Administrative Law Judge in a private contest declaring mining claims invalid precludes the Board from considering the contestee's appeal from the denial of a later protest to the extent that the appeal involves issues resolved in the contest decision.

Melvin Helit, A-Able Plumbing, Inc., 110 IBLA 144 (Aug. 10, 1989)

Hearings

An application for patent filed on behalf of the successor-in-interest to the grantee, as innocent purchaser for value from the railroad, pursuant to sec. 321(b) of the Transportation Act of 1940, is properly rejected when the land was known to be mineral in character at the time of conveyance, because title to land known to be mineral in character did not pass pursuant to the railroad grant statutes. If the applicant disputes this finding, a hearing is ordinarily required.

Lloyd D. Hayes, 108 IBLA 189 (Apr. 13, 1989)

RULES OF PRACTICE--Continued

APPEALS--Continued

Hearings--Continued

When an appellant fails to submit any evidence tending to contradict the evidence presented by the Bureau of Land Management, there is no factual dispute and the Board will reject appellant's request for an evidentiary hearing pursuant to 43 CFR 4.415.

Lazy VD Land & Livestock Co., 108 IBLA 224 (Apr. 19, 1989)

The Director, MMS, held that the lessee violated 30 CFR 250.41(a)(2) because it knew or should have known that its actions could result in a blowout leading to the loss of gas. The lessee has responded claiming that, based upon information available to it during drilling, its actions were reasonable and prudent, and that the sole cause of the well loss was unforseeable. The record presents unresolved factual issues, and a hearing before an Administrative Law Judge is ordered.

Chevron U.S.A. Inc., et al., 110 IBLA 216 (Aug. 23, 1989)

Notice of Appeal

Proper application of the Department's rules of practice requires an affirmative showing that a representative of a named appellant is qualified and authorized to represent any other purported appellant or appellants, if single representation for multiple parties is intended.

The Wilderness Society, 109 IBLA 175 (June 9, 1989)

Standing to Appeal

The owner of improvements located on land described in a Native allotment application has standing to protest the allotment application under sec. 905 of the Alaska National Interest Lands Conservation Act, 43 U.S.C. § 1634 (1982). Standing to appeal favorable adjudication of the allotment application and rejection of the protest to the Board of Land Appeals requires a

showing of a legally cognizable interest adversely affected by denial of the protest. The interest of a trespasser on the land without claim or color of right will not afford such standing.

Eugene M. Witt, 107 IBLA 229 (Feb. 21, 1989)

The surface owner of land patented under the Stock-Raising Homestead Act, as amended, 43 U.S.C. § 291 (1970), has standing to appeal a decision of the Bureau of Land Management concerning the ownership of certain subsurface materials, even though the surface owner was not served with a copy of the notice of trespass initiating the action, when the decision holds that the subsurface materials are owned by the United States, rather than by the surface owner.

Lazy VD Land & Livestock Co., 108 IBLA 224 (Apr. 19, 1989)

In order for an individual or organization to establish standing to appeal under 43 CFR 4.410, the individual or organization must show that he or she is a party to the case and that a legally cognizable interest has been adversely affected by the decision being appealed.

Where, on appeal from a denial of a protest, an appellant fails to make an adequate showing how any legally cognizable interest has been adversely affected by the denial of the protest, such an appellant will be deemed to lack standing to appeal and the appeal will be dismissed.

Colorado Open Space Council, Sierra Club, 109 IBLA 274 (June 20, 1989)

RULES OF PRACTICE--Continued

APPEALS--Continued

Standing to Appeal--Continued

A group that has not participated in agency decisionmaking prior to approval by BLM of a mining plan of operations is not a "party to a case" within the meaning of 43 CFR 4.410(a) for purposes of appeal.

A group is not entitled to personal notice of all planned actions affecting public lands in Nevada simply because it has asserted a general interest in natural resource development in the State.

To obtain standing for review by the Board of Land Appeals a party must have participated in Bureau of Land Management decisionmaking prior to issuance of the decision sought to be reviewed. Even though a group may be adversely affected by decisionmaking, it lacks standing to appeal if it is not a party to the case.

The Wilderness Society, 110 IBLA 67 (July 20, 1989)

A mining claimant has standing to appeal from decisions declaring his claims invalid.

Melvin Helit, A-Able Plumbing, Inc., 110 IBLA 144 (Aug. 10, 1989)

An appeal from a BLM decision dismissing a protest of a BLM dependent resurvey which did not affect any corner or line separating Federal from the protestant's private land will be dismissed where the protestants were not adversely affected by the decision.

Wilogene Simpson et al., 110 IBLA 271 (Sept. 13, 1989)

Statement of Reasons

Where an MMS bill for collection demanding interest on late payments of royalties is challenged by the royalty payor in an appeal to the Director, MMS, solely on the basis that interest was assessed from an improper date, resulting in an overcharge, thereby acquiescing in MMS' authority to assess interest, the Board of Land Appeals, in a subsequent appeal of the Director's decision by that royalty payor, may decline

RULES OF PRACTICE--Continued

APPEALS--Continued

Statement of Reasons--Continued

to entertain arguments directed to MMS' authority to assess interest.

ANR Production Co., 108 IBLA 387 (May 22, 1989)

Timely Filing

An administrative appeal must be filed within 30 days of receipt of the decision from which an appeal is taken. 43 CFR 411. The timely filing of an administrative appeal is jurisdictional and the failure to file timely mandates dismissal of the appeal.

D. R. Johnson Lumber Co., 106 IBLA 379 (Jan. 19, 1989)

"Service." A notice of appeal from a decision of the Bureau of Land Management must be filed within 30 days after the person taking the appeal is "served" with the decision from which the appeal is taken. Where BLM mails its adverse decision to an address other than the person's last address of record and the decision is returned by the Postal Service because a forwarding order has expired, the decision has not been constructively "served." In these circumstances, an appeal which is subsequently filed within 30 days of the person's receipt of actual notice of the adverse decision is timely.

Jean Emanuel Hatton, Eva M. Pool, Phillip Emanuel, 107 IBLA 47 (Jan. 27, 1989)

A party who is adversely affected by a decision of an officer of BLM may appeal that decision to the Board of Land Appeals. However, a notice of appeal must be filed with BLM within 30 days after the date of service. The timely filing of a notice of appeal is jurisdictional. The failure to file within the time allowed renders the decision final and requires dismissal of the appeal.

Stewart L. Ashton, 107 IBLA 140 (Feb. 6, 1989)

RULES OF PRACTICE--Continued

APPEALS--Continued

Timely Filing--Continued

The time for filing a request for a hearing with respect to issuance of a surface mining permit under sec. 514(c) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1264(c) (1982), is limited by the terms of the statute and the regulation at 30 CFR 775.11(a) to 30 days from the time the applicant is notified of the decision of the regulatory authority on the permit application. The timely filing of a request for hearing is essential to establish the jurisdiction of the Office of Hearings and Appeals to review a permit decision and a decision dismissing the appeal will be affirmed where it appears from the record that the request was not filed within the time limit.

The Hopi Tribe v. Office of Surface Mining Reclamation & Enforcement, 109 IBLA 374 (June 23, 1989)

Departmental regulation 43 CFR 4.411 provides that a person served with the decision being appealed must transmit the notice of appeal in time for it to be filed in the office where it is required to be filed within 30 days after the date of service. If a decision is published in the Federal Register, a person not served with the decision must transmit a notice of appeal in time for it to be filed within 30 days after the date of publication. If a decision is not published in the Federal Register and an appeal is brought by a person who is not served with the decision, the appellant must establish that he was entitled to personal service of the decision or that his appeal was filed within 30 days after service of the decision upon the party or parties of record.

Lew Landers, 109 IBLA 391 (June 26, 1989)

EVIDENCE

The legal presumption that administrative officials have properly discharged their duties and not lost or misplaced documents filed with them is rebuttable by probative evidence to the contrary. The presumption is not overcome by a statement, without corroborating evidence, that a document was mailed, or by evidence

EVIDENCE--Continued

that the claimant timely recorded a copy with the local recording office.

Donald G. Sterner, 109 IBLA 76 (May 30, 1989)

Daniel D. Draper, 109 IBLA 85 (May 31, 1989)

A holder of a noncompetitive oil and gas lease who challenges a determination that certain lands are within the known geologic structure of a producing oil or gas field has the burden of establishing that the determination is in error. Where the record establishes that the Secretary's technical expert has made a reasoned analysis of the available geological data, the Secretary is entitled to rely upon his expert's professional opinion, absent a showing of error by a preponderance of the evidence.

John R. Stamper, BHP Petroleum (Americas), Inc., 110 IBLA 130 (Aug. 9, 1989)

HEARINGS

Upon a determination that production has ceased on an oil and gas lease in its extended term by reason of such production because the well on the lease is no longer capable of production in paying quantities, the affected parties are entitled to notice and an opportunity to request a hearing on the issue of the productive capacity of the well where they have presented evidence raising an issue of fact regarding the status of the well.

Daymon D. Gililland, 108 IBLA 144 (Apr. 5, 1989)

PRIVATE CONTESTS

Summary dismissal of a private contest against an Alaska headquarters site cannot be sustained on grounds the contestee was not served with the contest complaint where, on appeal, the contestant produces proof that

PRIVATE CONTESTS--Continued

the complaint was served in conformity to 43 CFR 4.450-5.

Pursuant to 43 CFR 4.450-1, a private contest may not be brought for reasons appearing of record with the Bureau of Land Management. Where all the matters alleged by a contest complaint appear on agency records at the time the complaint is filed, it is subject to summary dismissal.

Kim M. Cook v. Mary Frances DeHart Buren, 106 IBLA 294 (Jan. 5, 1989)

An Alaska Native allotment applicant is required to make satisfactory proof of substantially continuous use and occupancy of the land for a minimum period of 5 years. Such use and occupancy contemplates substantial actual possession or use of the land, at least potentially exclusive of others. In a private contest initiated by a Native corporation following a BLM decision holding the Native allotment for approval, the Native corporation carries the burden of showing by a preponderance of the evidence that the Native allotment application is not valid.

Kootznoowoo, Inc. v. Heirs of Jimmie Johnson, 109 IBLA 128 (June 8, 1989)

The failure to file a timely appeal from a decision by an Administrative Law Judge in a private contest declaring mining claims invalid precludes the Board from considering the contestee's appeal from the denial of a later protest to the extent that the appeal involves issues resolved in the contest decision.

Melvin Helit, A-Able Plumbing, Inc., 110 IBLA 144 (Aug. 10, 1989)

RULES OF PRACTICE--Continued

PRIVATE CONTESTS--Continued

When the Board conducts de novo review of a decision of an Administrative Law Judge who erroneously allocated the burden of proof in a private contest proceeding to the applicant for a Native allotment rather than to the contestant, the Board properly reviews the entire record to determine whether the applicant established by a preponderance of the evidence that he satisfactorily proved he was entitled to an allotment.

Ira Wassillie (On Reconsideration), 111 IBLA 53 (Sept. 20, 1989)

Jurisdiction over disputes between rival mining claimants is reserved to the courts, and it is not for the Department to decide whether one claimant has a better right to a claim because the rival claimant has allegedly failed to file the document required under sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1976).

Rufus B. McIlroy, 111 IBLA 144 (Sept. 29, 1989)

PROTESTS

The mere assertion that mining claims were located while the land was closed to mineral entry, unsupported by probative evidence of that fact, provides an insufficient basis for the rejection of a mining plan of operations filed with respect to such claims.

Department of the Navy, 108 IBLA 334 (May 8, 1989)

Where BLM issued a record of decision determining to issue a natural gas pipeline right-of-way and therein provides for a "30 days comment period" and in a notice of its decision also informs interested parties that the decision is subject to appeal, the Board will entertain a timely appeal of the decision where the record shows

RULES OF PRACTICE--Continued

PROTESTS--Continued

that BLM clearly was issuing a decision ripe for administrative review and the reference to a public comment period was inadvertent and unintended.

Hoosier Environmental Council, 109 IBLA 160 (June 8, 1989)

A group that has not participated in agency decisionmaking prior to approval by BLM of a mining plan of operations is not a "party to a case" within the meaning of 43 CFR 4.410(a) for purposes of appeal.

The Wilderness Society, 110 IBLA 67 (July 20, 1989)

SECRETARY OF THE INTERIOR

Where a decision of the Director, Minerals Management Service, is approved by an Assistant Secretary, the decision is final for the Department and the Board of Land Appeals lacks jurisdiction to review either the substance thereof or the procedures followed in issuing the decision.

Marathon Oil Co., 108 IBLA 177 (Apr. 12, 1989)

The Secretary of the Interior may delegate to subordinate officials the authority to approve tribal ordinances granted to him in tribal constitutions.

Fort McDermitt Paiute Shoshone Tribe v. Acting Phoenix Area Director, Bureau of Indian Affairs, 17 IBIA 144 (June 21, 1989)

When it appears an applicant for a Native allotment may not have presented satisfactory proof of his substantially continuous use and occupancy of the land for a period of 5 years, the Board may, in the absence of legislative approval, review the record and act to prevent the mistaken issuance of a patent to the land

to one not entitled to it, even if the Bureau of Land Management has already approved the application.

Ira Wassillie (On Reconsideration), 111 IBLA 53 (Sept. 20, 1989)

SEGREGATION

Where a Federal district court issues a preliminary injunction which has the effect of suspending the termination of a multiple-use classification which segregated the land from mineral entry, thereby reinstating the terms of the classification, a mining claim subsequently located on land subject to that injunction is properly declared null and void ab initio.

Art Marinaccio, 107 IBLA 303 (Mar. 2, 1989)

BLM may properly declare a mining claim located on land segregated from mineral entry, pursuant to 43 CFR 2627.4(b), by virtue of the filing of an Alaska State selection application, null and void ab initio when there is no showing that the claim relates back to a date of location prior to the segregation.

Sec. 906(e) of ANILCA, 43 U.S.C. § 1635(e) (1982), amended the Alaska Statehood Act to permit the State to file new applications to include lands which were not vacant, unappropriated, and unreserved at the time the sec. 906(e) "top filing" application was filed. Such State selection applications become an effective selection upon the date the lands become available within the meaning of the Alaska Statehood Act. Lands subject to valid mining claims on the date a state "top filing" application is filed become subject to state selection when the claims are abandoned, either intentionally or by action of law.

Vernon F. Miller, 110 IBLA 20 (July 6, 1989)

Upon issuance of a final certificate of mineral entry for mining claims, the lands encompassed by the claims are closed to mineral entry by another person, and any claims located thereafter on the lands covered by the final certificate are null and void ab initio.

Melvin Helit, A-Able Plumbing, Inc., 110 IBLA 144 (Aug. 10, 1989)

SPECIAL USE PERMITS

In choosing between two qualified first-time applicants for a special recreation permit for walk-in fishing in the Gunnison Gorge, BLM's use of a coin toss to select the applicant was an equitable way to award the permit and will be affirmed.

The issuance of a special recreation permit is discretionary with the authorized officer, and where necessary, BLM may restrict use in the Gunnison Gorge by issuing a limited number of special recreation permits. Where there is a reasonable basis for the selection process implementing its management policy, BLM's decision will be affirmed.

Gunnison River Expeditions, 108 IBLA 271 (Apr. 25, 1989)

STATE SELECTIONS

The Board will affirm a BLM decision finding land proper for selection by the State of Alaska in the face of an appeal challenging that decision on the basis that the appellants have a superior interest in the land by virtue of a prior homestead entry where final proof submitted in support of that entry was rejected by BLM with administrative finality and appellants have not demonstrated that the rejection was erroneous.

Estate of Sam McGee & Alice Jo McGee-Ward-Pritchard, 108 IBLA 375 (May 19, 1989)

STATUTES

An essential element of a claim for estoppel is that the party asserting it must be ignorant of the true facts. Since, however, all persons are presumed to have knowledge of relevant statutory and regulatory provisions, estoppel will not lie when the legal consequences of an action are clearly set forth in statute and/or regulation.

Terra Resources, Inc., 107 IBLA 10 (Jan. 24, 1989)

STATUTORY CONSTRUCTION

GENERALLY

Sec. 111(a) of the Federal Oil and Gas Royalty Management Act, 30 U.S.C. § 1721(a) (1982), authorizes the collection of interest charges for late payment of oil and gas royalties. Sec. 305 of that Act, 30 U.S.C. § 1701 note (1982), provides that sec. 111 and regulations implemented pursuant thereto apply to oil and gas leases issued prior to the enactment of that Act, unless to do so would be contrary to express and specific provisions of those leases. Where no such provisions exist, the assessment of late payment charges is proper.

The procedural safeguards that apply when civil penalties are levied pursuant to 30 U.S.C. § 1719 (1982), are not applicable to late payment interest charges assessed pursuant to 30 U.S.C. § 1721(a) (1982).

Coastal Oil and Gas Corp., et al., 108 IBLA 62 (Mar. 22, 1989)

IMPLIED REPEALS

The requirement that OSMRE condition approval of an underground coal mining permit on compliance with state regulatory provisions that are part of a state program necessitates that, to the extent those state standards may be inconsistent with the common law doctrine of subsidence damage mitigation, the state regulations are controlling.

Old Ben Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 109 IBLA 362 (June 23, 1989)

STOCK-RAISING HOMESTEADS

The surface owner of land patented under the Stock-Raising Homestead Act, as amended, 43 U.S.C. § 291 (1970), has standing to appeal a decision of the Bureau of Land Management concerning the ownership of certain subsurface materials, even though the surface owner was not served with a copy of the notice of trespass initiating the action, when the decision holds that the subsurface materials are owned by the United States, rather than by the surface owner.

Lazy VD Land & Livestock Co., 108 IBLA 224 (Apr. 19, 1989)

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977

GENERALLY

To qualify for an exemption under sec. 701(28)(A) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1291(28)(A) (1982), extraction of coal must be incidental to the extraction of other minerals and constitute less than 16-2/3 percent of the tonnage of minerals removed for purposes of commercial use and sale. The burden of proving entitlement to the exemption rests upon the party claiming it.

JDG, Inc. v. Office of Surface Mining Reclamation & Enforcement, 107 IBLA 210 (Feb. 16, 1989)

When an appeal to the Board of Land Appeals is filed from a citizen complaint decision by an officer of OSMRE under 43 CFR 4.1280, OSMRE is obliged to submit the complete, original administrative record to the Board, including all original documentation involved in the matter. It is not adequate to submit copies of only those documents deemed relevant by OSMRE as part of the pleadings filed on appeal.

Save Our Cumberland Mountains, Inc., 108 IBLA 70 (Mar. 23, 1989) 96 I.D. 139

GENERALLY--Continued

Enforcement action taken to compel compliance with regulations implementing SMCRA provision requiring removal of highwalls constitutes exercise of OSMRE's police or regulatory power and Departmental review of such action is not stayed by the filing of a bankruptcy petition.

Cherry Hill Development v. Office of Surface Mining Reclamation & Enforcement, 108 IBLA 92 (Mar. 28, 1989)

"Supervised by an Indian tribe." As used in sec. 701(9) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1291(9) (1982), land is "supervised by an Indian tribe" where an Indian owns either the mineral estate, the surface estate in fee, or both.

Valencia Energy Co., et al., 109 IBLA 40 (May 26, 1989)
96 I.D. 239

ABATEMENT

Generally

OSMRE may properly refuse to grant a request for an extension of time to abate a violation for failure to stabilize rills and gullies where the evidence shows that the failure to abate was a result of the permittee's lack of diligence in arranging for the necessary work to be completed during the abatement period, rather than due to adverse climatological conditions.

Turner Brothers, Inc. v. Office of Surface Mining Reclamation & Enforcement, 107 IBLA 174 (Feb. 13, 1989)

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977
--Continued

ABATEMENT--Continued

Generally--Continued

Timely performance of abatement activities required by a notice of violation cannot be considered as a stipulation by the permittee that the notice was validly issued.

Turner Brothers, Inc. v. Office of Surface Mining Reclamation & Enforcement, 107 IBLA 307 (Mar. 2, 1989)

Where, in accordance with 30 CFR 700.11(c), a state regulatory authority has, by virtue of issuing a 2-acre permit, made a determination that a surface coal mining operation is exempt from compliance with the requirement to eliminate all highwalls set forth in sec. 515(b)(3) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1265(b)(3) (1982), and subsequently reverses that determination by taking other enforcement action inconsistent with that exemption, OSMRE will not be considered barred from taking action to require elimination of all highwalls where the offending highwall created by such operations constituted an existing violation at the time of reversal.

Cherry Hill Development v. Office of Surface Mining Reclamation & Enforcement, 110 IBLA 185 (Aug. 17, 1989)

Remedial Actions

When a citizen files a request for a Federal inspection in a state where OSMRE is enforcing the state's program, OSMRE is required to conduct a Federal inspection under 30 CFR 842.11(b)(1)(i) when the authorized representative has reason to believe on the basis of information available to him (other than information resulting from a previous Federal inspection) that there exists a violation of the Surface Mining Control and Reclamation Act of 1977, its regulations, the applicable program, or any condition of a permit or an exploration approval, or that there exists any condition, practice, or violation which creates an imminent danger to the health or safety of the public or is causing or could reasonably be expected to cause a significant, imminent environmental harm to land, air, or water resources. Under 30 CFR 842.11(b)(2), OSMRE has reason to believe that a violation exists if the

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977
--Continued

ABATEMENT--Continued

Remedial Actions--Continued

facts alleged by the informant would, if true, constitute a violation. If there is a violation, OSMRE is required to take whatever action is necessary to secure abatement of the violation.

Under 30 CFR 942.816(e), in area mining, rough backfilling and grading of an area must be completed within 180 days following removal of coal from that area. If a citizen files a complaint alleging that any area from which coal has been removed has been exposed for 180 days or more, OSMRE should inspect the site and take appropriate enforcement action, excepting only where the permittee has previously demonstrated through the detailed written analysis required by 30 CFR 780.18(b)(3) that further time is justified.

Save Our Cumberland Mountains, Inc., 108 IBLA 70
(Mar. 23, 1989) 96 I.D. 139

ADMINISTRATIVE PROCEDURE

Generally

When an appeal to the Board of Land Appeals is filed from a citizen complaint decision by an officer of OSMRE under 43 CFR 4.1280, OSMRE is obliged to submit the complete, original administrative record to the Board, including all original documentation involved in the matter. It is not adequate to submit copies of only those documents deemed relevant by OSMRE as part of the pleadings filed on appeal.

Save Our Cumberland Mountains, Inc., 108 IBLA 70
(Mar. 23, 1989) 96 I.D. 139

Burden of Proof

In a proceeding upon an application for review of an NOV, the burden of going forward to establish a prima facie case as to the validity of the notice rests with OSMRE. A prima facie case is presented if OSMRE presents essential facts from which it may be determined that a violation of pertinent requirements has

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977
--Continued

ADMINISTRATIVE PROCEDURE--Continued

Burden of Proof--Continued

occurred. If OSMRE meets its burden, the ultimate burden of persuasion rests with the applicant for review.

Innovative Development of Energy, Inc. v. Office of Surface Mining Reclamation & Enforcement, 110 IBLA 119 (Aug. 8, 1989)

Scope of Review

Enforcement action taken to compel compliance with regulations implementing SMCRA provision requiring removal of highwalls constitutes exercise of OSMRE's police or regulatory power and Departmental review of such action is not stayed by the filing of a bankruptcy petition.

Cherry Hill Development v. Office of Surface Mining Reclamation & Enforcement, 108 IBLA 92 (Mar. 28, 1989)

APPEALS

Generally

When an appeal to the Board of Land Appeals is filed from a citizen complaint decision by an officer of OSMRE under 43 CFR 4.1280, OSMRE is obliged to submit the complete, original administrative record to the Board, including all original documentation involved in the matter. It is not adequate to submit copies of only those documents deemed relevant by OSMRE as part of the pleadings filed on appeal.

Save Our Cumberland Mountains, Inc., 108 IBLA 70
(Mar. 23, 1989) 96 I.D. 139

APPEALS--Continued

Generally--Continued

Pursuant to 43 CFR 4.1270(b), a petition for discretionary review of a decision of an Administrative Law Judge disposing of a civil penalty proceeding which is not timely filed must be denied.

Cherry Hill Development v. Office of Surface Mining Reclamation & Enforcement, 108 IBLA 92 (Mar. 28, 1989)

Where at the time of permit approval under a Federal lands program in a state without a cooperative agreement, OSMRE conditions permit approval on a state regulatory program regulation regarding subsidence control, such a condition is proper and this Board has no jurisdiction to entertain an argument that the regulation is more stringent than standards required by the Surface Mining Control and Reclamation Act of 1977, and, therefore, unenforceable under state law.

Old Ben Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 109 IBLA 362 (June 23, 1989)

The time for filing a request for a hearing with respect to issuance of a surface mining permit under sec. 514(c) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1264(c) (1982), is limited by the terms of the statute and the regulation at 30 CFR 775.11(a) to 30 days from the time the applicant is notified of the decision of the regulatory authority on the permit application. The timely filing of a request for hearing is essential to establish the jurisdiction of the Office of Hearings and Appeals to review a permit decision and a decision dismissing the appeal will be affirmed where it appears from the record that the request was not filed within the time limit.

An appeal will ordinarily be dismissed as moot where, as a result of events occurring after the appeal is filed, there is no effective relief which the Board can afford the appellant.

The Hopi Tribe v. Office of Surface Mining Reclamation & Enforcement, 109 IBLA 374 (June 23, 1989)

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977
--Continued

APPEALS--Continued

Effect of

Enforcement action taken to compel compliance with regulations implementing SMCRA provision requiring removal of highwalls constitutes exercise of OSMRE's police or regulatory power and Departmental review of such action is not stayed by the filing of a bankruptcy petition.

Cherry Hill Development v. Office of Surface Mining Reclamation & Enforcement, 108 IBLA 92 (Mar. 28, 1989)

APPLICABILITY

Generally

Where OSMRE has assumed direct Federal enforcement of a state program, it properly declines to take enforcement action in response to a citizen's complaint where the complainant fails to establish any violation of the state equivalent of the Surface Mining Control and Reclamation Act of 1977, as amended, 30 U.S.C. §§ 1201-1328 (1982), or its implementing regulations as a result of the mine operator's construction of a permanent water impoundment and drainage channel, removal and placement of topsoil within the permitted area, and filling in of an open pit on adjacent non-permitted land.

Willie N. Cook, 107 IBLA 278 (Feb. 23, 1989)

Where a portion of a county road used as a haul road for a surface coal mining operation is not excepted from the "affected area" under 30 CFR 701.5 (1986), and, when added to the area which the operator admits is affected by its operations, causes such operations to affect more than 2 acres, the operations will not be considered exempt from compliance with the requirement to eliminate all highwalls set forth in sec. 515(b)(3) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1265(b)(3) (1982).

Cherry Hill Development v. Office of Surface Mining Reclamation & Enforcement, 110 IBLA 185 (Aug. 17, 1989)

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977
--Continued

APPLICABILITY--Continued

Enforcement Provisions

Where, in accordance with 30 CFR 700.11(c), a state regulatory authority has, by virture of issuing a 2-acre permit, made a determination that a surface coal mining operation is exempt from compliance with the requirement to eliminate all highwalls set forth in sec. 515(b)(3) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1265(b)(3) (1982), and subsequently reverses that determination by taking other enforcement action inconsistent with that exemption, OSMRE will not be considered barred from taking action to require elimination of all highwalls where the offending highwall created by such operations constituted an existing violation at the time of reversal.

Cherry Hill Development v. Office of Surface Mining Reclamation & Enforcement, 110 IBLA 185 (Aug. 17, 1989)

ATTORNEYS' FEES/COSTS AND EXPENSES

Generally

The provision for the awarding of costs and expenses, including attorneys' fees, in sec. 525(e) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1275(e) (1982), is applicable to permit review proceedings initiated and prosecuted pursuant to sec. 514 of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1264 (1982).

Natural Resources Defense Council, Inc., et al. (Petitioners) v. Office of Surface Mining Reclamation and Enforcement (Respondent), West Elk Coal Co., State of Colorado (Intervenors), 107 IBLA 339 (Mar. 20, 1989)
96 I.D. 83

The forum in which a petition for an award of costs and expenses, including attorneys' fees, is properly filed as dictated, in accordance with 43 CFR 4.1291, by the forum that issues the "final order." If the Administrative Law Judge's decision becomes final because no party seeks timely review by the Board of that decision, the petition must be filed with the Administrative Law Judge. However, if timely review is sought, the Board's disposition thereof will be

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977
--Continued

ATTORNEYS' FEES/COSTS AND EXPENSES--Continued

Generally--Continued

considered the "final order" for purposes of 43 CFR 4.1291, and the petition must be filed with the Board.

A petition for an award of costs and expenses, including attorneys' fees, must be filed within 45 days of receipt of the decision or order of the Board that disposes of the case, even if a petition for reconsideration or other motion is filed concerning that decision or order.

When good cause exists for the failure to file a petition for an award for costs and expenses within 45 days of receipt of a final order, there is no waiver of the right to such an award.

Rith Energy, Inc. v. Office of Surface Mining Reclamation & Enforcement, Save Our Cumberland Mountains, Bledsoe County Chapter (Intervenor), 108 IBLA 114 (Mar. 30, 1989)

Final Order

The forum in which a petition for an award of costs and expenses, including attorneys' fees, is properly filed as dictated, in accordance with 43 CFR 4.1291, by the forum that issues the "final order." If the Administrative Law Judge's decision becomes final because no party seeks timely review by the Board of that decision, the petition must be filed with the Administrative Law Judge. However, if timely review is sought, the Board's disposition thereof will be considered the "final order" for purposes of 43 CFR 4.1291, and the petition must be filed with the Board.

A petition for an award of costs and expenses, including attorneys' fees, must be filed within 45 days of receipt of the decision or order of the Board that disposes of the case, even if a petition for reconsideration or other motion is filed concerning that decision or order.

When good cause exists for the failure to file a petition for an award for costs and expenses within 45

ATTORNEYS' FEES/COSTS AND EXPENSES--Continued

Final Order--Continued

days of receipt of a final order, there is no waiver of the right to such an award.

Rith Energy, Inc. v. Office of Surface Mining Reclamation & Enforcement, Save Our Cumberland Mountains, Bledsoe County Chapter (Intervenor), 108 IBLA 114 (Mar. 30, 1989)

Standards for Award

Regulation 43 CFR 4.1294 provides that in order to recover an award of costs and expenses, including attorneys' fees, from a permittee, there must, inter alia, be a finding that the permittee violated the Surface Mining Control and Reclamation Act of 1977, the regulations promulgated pursuant to that Act, or a permit condition. Where in a proceeding to review the issuance of a permit to mine there is no such finding, a petitioner may not recover an award from the permittee.

Under 43 CFR 4.1294(b), a person who initiates or participates in a proceeding under the Surface Mining Control and Reclamation Act of 1977 may be eligible for an award of costs and expenses, including attorneys' fees, from OSMRE where that person prevails in whole or in part, achieving at least some degree of success on the merits. However, to be entitled to an award the regulation requires that the record show that the person made a substantial contribution to a full and fair determination of the issues.

A person challenging issuance of a permit to mine will be deemed eligible for an award of costs and expenses, including attorneys' fees, under sec. 525(e) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1275(e) (1982), and 43 CFR 4.1294(b), where the person achieved at least some degree of success on the merits. A finding by the Board of Land Appeals that, in part, vindicated the person's position that the permit was improperly issued, constitutes some degree of success on the merits even though the Board

ATTORNEYS' FEES/COSTS AND EXPENSES--Continued

Standards for Award--Continued

did not grant the ultimate relief requested by the person.

Where one is determined, pursuant to 43 CFR 4.1294(b), to be eligible for and entitled to an appropriate award of costs and expenses, including attorneys' fees, under sec. 525(e) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1275(e) (1982), a further determination must be made of what issues are compensable. This inquiry requires the identification of successful claims and those claims sufficiently related to the successful ones to warrant an award for time spent thereon. Unsuccessful claims unrelated to successful ones will not be compensated.

In determining the amount of an award of attorneys' fees under sec. 525(e) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1275(e) (1982), the Board of Land Appeals will use the "lodestar" forula, i.e., the number of hours reasonably expended on qualifying work multiplied by the reasonable hourly rate. There is a strong presumption that the lodestar represents the reasonable fee to which counsel is entitled.

A person challenging issuance of a permit to mine may receive an award of costs and expenses, including attorneys' fees, under sec. 525(e) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1275(e) (1982), for work performed in preparing and filing the petition for review of the permit. However, such an award will not include compensation for work performed in state proceedings involving the same minesite and a related state permitting process.

A person challenging issuance of a permit to mine may receive an award of costs and expenses, including attorneys' fees, under sec. 525(e) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1275(e) (1982), for work performed with respect to procedural victories which contributed to the person achieving some degree of success on the merits. However, OSMRE is not liable for attorneys' fees for procedural victories against parties other than OSMRE.

In determining the number of hours reasonably expended on qualifying work with respect to an award

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977
--Continued

ATTORNEYS' FEES/COSTS AND EXPENSES--Continued

Standards for Award--Continued

of attorneys' fees under sec. 525(e) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1275(e) (1982), where the petitioner had achieved at least some degree of success on the merits, the Board may utilize, in the absence of an alternative approach, a page-counting method whereby the petitioner's major pleadings at various stages of the proceeding are examined to determine the number of pages devoted to a particular issue out of the total pages in the document. That percentage is then applied to the total number of hours sought to arrive at the number of hours reasonably expended.

A person challenging issuance of a permit to mine is not entitled to an award of costs and expenses, including attorneys' fees, under sec. 525(e) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1275(e) (1982), for work performed on unsuccessful settlement negotiations where the petitioner makes no attempt to relate the hours claimed to any particular entry on the attorneys' time records or to limit the hours claimed to only those issues upon which petitioner was ultimately successful.

A person who is eligible and entitled to an award of costs and expenses, including attorneys' fees, under sec. 525(e) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1275(e) (1982), may also receive compensation for work performed in prosecuting the petition for an award, commensurate with the degree of success achieved in the underlying proceedings.

In determining the reasonable hourly rate for purposes of calculation of the "lodestar" amount in an award of attorneys' fees under sec. 525(e) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1275(e) (1982), the Board will use that market rate prevailing at the time of the relevant administrative proceedings in the community where the proceedings took place. However, where the petitioner for an award can show that counsel with specialized expertise was essential to prosecution of the case, the Board may approve an hourly rate from the area where such counsel customarily practices.

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977
--Continued

ATTORNEYS' FEES/COSTS AND EXPENSES--Continued

Standards for Award--Continued

No enhancement of a "lodestar" amount will be granted in an award of attorneys' fees under sec. 525(e) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1275(e) (1982), based on the contingency of the award, where the success and impact of the case were not exceptional.

A person challenging issuance of a permit to mine may receive an award of expenses under sec. 525(e) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1275(e) (1982), for the expenses of an expert witness who assisted the person in preparing and presenting its case, commensurate with the degree of success achieved by the person on those issues addressed by the expert.

A person challenging issuance of a permit to mine may receive an award of expenses under sec. 525(e) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1275(e) (1982), for those expenses which are normally passed along to clients of the attorney representing that person, commensurate with the degree of success achieved by the person in the proceedings in question.

Natural Resources Defense Council, Inc., et al. (Petitioners) v. Office of Surface Mining Reclamation and Enforcement (Respondent), West Elk Coal Co., State of Colorado (Intervenors), 107 IBLA 339 (Mar. 20, 1989)
96 I.D. 83

Substantial Contribution

Under 43 CFR 4.1294(b), a person who initiates or participates in a proceeding under the Surface Mining Control and Reclamation Act of 1977 may be eligible for an award of costs and expenses, including attorneys' fees, from OSMRE where that person prevails in whole or in part, achieving at least some degree of success on the merits. However, to be entitled to an award the regulation requires that the record show that

ATTORNEYS' FEES/COSTS AND EXPENSES--Continued

Substantial Contribution--Continued

the person made a substantial contribution to a full and fair determination of the issues.

Natural Resources Defense Council, Inc., et al. (Petitioners) v. Office of Surface Mining Reclamation and Enforcement (Respondent), West Elk Coal Co., State of Colorado (Intervenors), 107 IBLA 339 (Mar. 20, 1989)
96 I.D. 83

BACKFILLING AND GRADING REQUIREMENTS

Generally

OSMRE may properly refuse to grant a request for an extension of time to abate a violation for failure to stabilize rills and gullies where the evidence shows that the failure to abate was a result of the permittee's lack of diligence in arranging for the necessary work to be completed during the abatement period, rather than due to adverse climatological conditions.

Turner Brothers, Inc. v. Office of Surface Mining Reclamation & Enforcement, 107 IBLA 174 (Feb. 13, 1989)

When a permittee has been cited for a violation of 25 CFR 216.105(i), concerning rills and gullies, the question of whether vegetation has been "established" within the meaning of that regulation is not governed by the revegetation requirements of 25 CFR 216.110. In the absence of any applicable regulation, or other agency guidance, providing a definition for "established," a dictionary definition of "established" may be applied.

The Pittsburg & Midway Coal Mining Co. v. Office of Surface Mining Reclamation & Enforcement, 107 IBLA 246 (Feb. 22, 1989)

BACKFILLING AND GRADING REQUIREMENTS--Continued

Generally--Continued

Under 30 CFR 942.816(e), in area mining, rough backfilling and grading of an area must be completed within 180 days following removal of coal from that area. If a citizen files a complaint alleging that any area from which coal has been removed has been exposed for 180 days or more, OSMRE should inspect the site and take appropriate enforcement action, excepting only where the permittee has previously demonstrated through the detailed written analysis required by 30 CFR 780.18(b)(3) that further time is justified.

Save Our Cumberland Mountains, Inc., 108 IBLA 70 (Mar. 23, 1989)
96 I.D. 139

Highwall Elimination

OSMRE will not be deemed collaterally estopped from issuing a notice of violation and cessation order for the failure to eliminate all highwalls in violation of sec. 515(b)(3) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1265(b)(3) (1982), where the State and Federal enforcement actions did not arise from the same operative facts.

Where a portion of a county road used as a haul road for a surface coal mining operation is not excepted from the "affected area" under 30 CFR 701.5 (1986), and, when added to the area which the operator admits is affected by its operations, causes such operations to affect more than 2 acres, the operations will not be considered exempt from compliance with the requirement to eliminate all highwalls set forth in sec. 515(b)(3) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1265(b)(3) (1982).

Where, in accordance with 30 CFR 700.11(c), a state regulatory authority has, by virtue of issuing a 2-acre permit, made a determination that a surface coal mining operation is exempt from compliance with the requirement to eliminate all highwalls set forth in sec. 515(b)(3) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1265(b)(3) (1982), and subsequently reverses that determination by taking other enforcement action inconsistent with that exemption, OSMRE will not be considered barred from taking

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977
--Continued

BACKFILLING AND GRADING REQUIREMENTS--Continued

Highwall Elimination--Continued

action to require elimination of all highwalls where the offending highwall created by such operations constituted an existing violation at the time of reversal.

Cherry Hill Development v. Office of Surface Mining Reclamation & Enforcement, 110 IBLA 185 (Aug. 17, 1989)

BONDS

Generally

When, in response to a 10-day notice, the state permanent regulatory authority informs OSMRE that it has issued two cessation orders for nonconcurrent reclamation of an abandoned minesite and is pursuing bond forfeiture, OSMRE may find such response to be appropriate within the meaning of sec. 521(a) of SMCRA, 30 U.S.C. § 1271(a) (1982). Upon such finding, no Federal inspection need ensue.

Mario L. Marcon, 109 IBLA 213 (June 12, 1989)

Forfeiture of

Neither SMCRA nor Departmental regulations implementing SMCRA contain provisions which operate to release a minesite from regulatory enforcement when a reclamation bond is forfeited. Under the provisions of 30 U.S.C. § 1259(b) (1982), an operator is liable for the duration of the surface coal mining and reclamation operation and for a period coincident with the operator's responsibility for revegetation. The Act contains no provision suggesting that the forfeiture of a performance bond creates a limitation upon the Federal regulation of a minesite subject to the Act.

Innovative Development of Energy, Inc. v. Office of Surface Mining Reclamation & Enforcement, 110 IBLA 119 (Aug. 8, 1989)

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977
--Continued

CESSATION ORDERS

Generally

OSMRE will not be deemed collaterally estopped from issuing a notice of violation and cessation order for the failure to eliminate all highwalls in violation of sec. 515(b)(3) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1265(b)(3) (1982), where the State and Federal enforcement actions did not arise from the same operative facts.

Cherry Hill Development v. Office of Surface Mining Reclamation & Enforcement, 110 IBLA 185 (Aug. 17, 1989)

CITIZEN COMPLAINTS

Generally

Where OSMRE has assumed direct Federal enforcement of a state program, it properly declines to take enforcement action in response to a citizen's complaint where the complainant fails to establish any violation of the state equivalent of the Surface Mining Control and Reclamation Act of 1977, as amended, 30 U.S.C. §§ 1201-1328 (1982), or its implementing regulations as a result of the mine operator's construction of a permanent water impoundment and drainage channel, removal and placement of topsoil within the permitted area, and filling in of an open pit on adjacent non-permitted land.

Willie N. Cook, 107 IBLA 278 (Feb. 23, 1989)

When a citizen files a request for a Federal inspection in a state where OSMRE is enforcing the state's program, OSMRE is required to conduct a Federal inspection under 30 CFR 842.11(b)(1)(i) when the authorized representative has reason to believe on the basis of information available to him (other than information resulting from a previous Federal inspection) that there exists a violation of the Surface Mining Control and Reclamation Act of 1977, its regulations, the applicable program, or any condition of a permit or an exploration approval, or that there exists any condition, practice, or violation which creates an imminent danger to the health or safety of the public or is causing or could reasonably be expected to cause

CITIZEN COMPLAINTS--Continued

Generally--Continued

a significant, imminent environmental harm to land, air, or water resources. Under 30 CFR 842.11(b)(2), OSMRE has reason to believe that a violation exists if the facts alleged by the informant would, if true, constitute a violation. If there is a violation, OSMRE is required to take whatever action is necessary to secure abatement of the violation.

Under 30 CFR 942.816(e), in area mining, rough backfilling and grading of an area must be completed within 180 days following removal of coal from that area. If a citizen files a complaint alleging that any area from which coal has been removed has been exposed for 180 days or more, OSMRE should inspect the site and take appropriate enforcement action, excepting only where the permittee has previously demonstrated through the detailed written analysis required by 30 CFR 780.18(b)(3) that further time is justified.

When an appeal to the Board of Land Appeals is filed from a citizen complaint decision by an officer of OSMRE under 43 CFR 4.1280, OSMRE is obliged to submit the complete, original administrative record to the Board, including all original documentation involved in the matter. It is not adequate to submit copies of only those documents deemed relevant by OSMRE as part of the pleadings filed on appeal.

Save Our Cumberland Mountains, Inc., 108 IBLA 70 (Mar. 23, 1989) 96 I.D. 139

When, in response to a 10-day notice, the state permanent regulatory authority informs OSMRE that it has issued two cessation orders for nonconcurrent reclamation of an abandoned minesite and is pursuing bond forfeiture, OSMRE may find such response to be appropriate within the meaning of sec. 521(a) of SMCRA, 30 U.S.C. § 1271(a) (1982). Upon such finding, no Federal inspection need ensue.

Mario L. Marcon, 109 IBLA 213 (June 12, 1989)

CIVIL PENALTIES

Generally

Under 30 CFR 845.13(b)(4)(i), from 1 to 10 points may be deducted in the assessment of a civil penalty where the person to whom the notice or order was issued achieved rapid compliance after notification of the violation. Rapid compliance requires that the person took extraordinary measures to abate the violation in the shortest possible time and that abatement was achieved before the time set. Where the only evidence relating to rapid compliance is that the violation was abated 1 day prior to the required time, the record does not support a deduction of any points for good faith.

Farrell-Cooper Mining Co. v. Office of Surface Mining Reclamation & Enforcement, 111 IBLA 115 (Sept. 28, 1989)

Amount

When OSMRE issues a notice of violation for livestock grazing under 30 CFR 715.20(e)(2), OSMRE shall assign up to 15 points, based upon the probability of revegetation failure and erosion, under 30 CFR 723.13(b)(2)(i), and up to 7 points, based upon the extent of potential or actual damage resulting from the violation, if the damage is confined to the permit area, under 30 CFR 723.13(b)(ii). This Board will reduce the number of points assigned for a violation of 30 CFR 715.20(e)(2) when the record discloses that the probability of revegetation failure and erosion was insignificant, rather than likely under 30 CFR 723.13(b)(2)(i), and where other mitigating factors were shown.

Lone Star Steel Co. v. Office of Surface Mining Reclamation & Enforcement, 107 IBLA 134 (Feb. 6, 1989)

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977
--Continued

CIVIL PENALTIES--Continued

Amount--Continued

Under 30 CFR 845.13(b)(4)(i), from 1 to 10 points may be deducted in the assessment of a civil penalty where the person to whom the notice or order was issued achieved rapid compliance after notification of the violation. Rapid compliance requires that the person took extraordinary measures to abate the violation in the shortest possible time and that abatement was achieved before the time set. Where the only evidence relating to rapid compliance is that the violation was abated 1 day prior to the required time, the record does not support a deduction of any points for good faith.

Under 30 CFR 845.13(b)(3)(B), a violation which is caused by negligence shall be assigned 12 points or less, depending on the degree of negligence. Where an Administrative Law Judge assigns 12 points for negligence based on his finding that the degree of negligence was "insignificant," either that finding or the assignment of 12 points is inappropriate since "insignificant" negligence would necessarily warrant an assignment of substantially less than 12 points.

An Administrative Law Judge's reduction of points from 13 to 1 for probability of occurrence based on a finding that the probability of occurrence of sediment leaving the permit due to the failure to construct a sedimentation pond was insignificant will be affirmed on appeal where there is no evidence that sediment from the disturbed area had been carried off the permit area at the time of the OSMRE inspection and it was extremely doubtful that sediment would have been carried off the permit area prior to installation of the sedimentation pond which was approved, as part of a mining plan revision, on the date of the OSMRE inspection.

Farrell-Cooper Mining Co. v. Office of Surface Mining Reclamation & Enforcement, 111 IBLA 115 (Sept. 28, 1989)

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977
--Continued

CIVIL PENALTIES--Continued

Negligence

Under 30 CFR 845.13(b)(3)(B), a violation which is caused by negligence shall be assigned 12 points or less, depending on the degree of negligence. Where an Administrative Law Judge assigns 12 points for negligence based on his finding that the degree of negligence was "insignificant," either that finding or the assignment of 12 points is inappropriate since "insignificant" negligence would necessarily warrant an assignment of substantially less than 12 points.

Farrell-Cooper Mining Co. v. Office of Surface Mining Reclamation & Enforcement, 111 IBLA 115 (Sept. 28, 1989)

Probability of Occurrence

When OSMRE issues a notice of violation for livestock grazing under 30 CFR 715.20(e)(2), OSMRE shall assign up to 15 points, based upon the probability of revegetation failure and erosion, under 30 CFR 723.13(b)(2)(i), and up to 7 points, based upon the extent of potential or actual damage resulting from the violation, if the damage is confined to the permit area, under 30 CFR 723.13(b)(ii). This Board will reduce the number of points assigned for a violation of 30 CFR 715.20(e)(2) when the record discloses that the probability of revegetation failure and erosion was insignificant, rather than likely under 30 CFR 723.13(b)(2)(i), and where other mitigating factors were shown.

Lone Star Steel Co. v. Office of Surface Mining Reclamation & Enforcement, 107 IBLA 134 (Feb. 6, 1989)

An Administrative Law Judge's reduction of points from 13 to 1 for probability of occurrence based on a finding that the probability of occurrence of sediment leaving the permit due to the failure to construct a sedimentation pond was insignificant will be affirmed on appeal where there is no evidence that sediment from the disturbed area had been carried off the permit area at the time of the OSMRE inspection and it was extremely doubtful that sediment would have been carried off the

CIVIL PENALTIES--Continued

Probability of Occurrence--Continued

permit area prior to installation of the sedimentation pond which was approved, as part of a mining plan revision, on the date of the OSMRE inspection.

Farrell-Cooper Mining Co. v. Office of Surface Mining Reclamation & Enforcement, 111 IBLA 115 (Sept. 28, 1989)

Seriousness

When OSMRE issues a notice of violation for livestock grazing under 30 CFR 715.20(e)(2), OSMRE shall assign up to 15 points, based upon the probability of revegetation failure and erosion, under 30 CFR 723.13(b)(2)(i), and up to 7 points, based upon the extent of potential or actual damage resulting from the violation, if the damage is confined to the permit area, under 30 CFR 723.13(b)(ii). This Board will reduce the number of points assigned for a violation of 30 CFR 715.20(e)(2) when the record discloses that the probability of revegetation failure and erosion was insignificant, rather than likely under 30 CFR 723.13(b)(2)(i), and where other mitigating factors were shown.

Lone Star Steel Co. v. Office of Surface Mining Reclamation & Enforcement, 107 IBLA 134 (Feb. 6, 1989)

ENFORCEMENT PROCEDURES

Generally

OSMRE may properly refuse to grant a request for an extension of time to abate a violation for failure to stabilize rills and gullies where the evidence shows that the failure to abate was a result of the permittee's lack of diligence in arranging for the necessary work to be completed during the abatement

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977
--Continued

ENFORCEMENT PROCEDURES--Continued

Generally--Continued

period, rather than due to adverse climatological conditions.

Turner Brothers, Inc. v. Office of Surface Mining Reclamation & Enforcement, 107 IBLA 174 (Feb. 13, 1989)

Where OSMRE has assumed direct Federal enforcement of a state program, it properly declines to take enforcement action in response to a citizen's complaint where the complainant fails to establish any violation of the state equivalent of the Surface Mining Control and Reclamation Act of 1977, as amended, 30 U.S.C. §§ 1201-1328 (1982), or its implementing regulations as a result of the mine operator's construction of a permanent water impoundment and drainage channel, removal and placement of topsoil within the permitted area, and filling in of an open pit on adjacent non-permitted land.

Willie N. Cook, 107 IBLA 278 (Feb. 23, 1989)

When a citizen files a request for a Federal inspection in a state where OSMRE is enforcing the state's program, OSMRE is required to conduct a Federal inspection under 30 CFR 842.11(b)(1)(i) when the authorized representative has reason to believe on the basis of information available to him (other than information resulting from a previous Federal inspection) that there exists a violation of the Surface Mining Control and Reclamation Act of 1977, its regulations, the applicable program, or any condition of a permit or an exploration approval, or that there exists any condition, practice, or violation which creates an imminent danger to the health or safety of the public or is causing or could reasonably be expected to cause a significant, imminent environmental harm to land, air, or water resources. Under 30 CFR 842.11(b)(2), OSMRE has reason to believe that a violation exists if the

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977 --Continued

ENFORCEMENT PROCEDURES--Continued

Generally--Continued

facts alleged by the informant would, if true, constitute a violation. If there is a violation, OSMRE is required to take whatever action is necessary to secure abatement of the violation.

Under 30 CFR 942.816(e), in area mining, rough backfilling and grading of an area must be completed within 180 days following removal of coal from that area. If a citizen files a complaint alleging that any area from which coal has been removed has been exposed for 180 days or more, OSMRE should inspect the site and take appropriate enforcement action, excepting only where the permittee has previously demonstrated through the detailed written analysis required by 30 CFR 780.18(b)(3) that further time is justified.

Save Our Cumberland Mountains, Inc., 108 IBLA 70 (Mar. 23, 1989) 96 I.D. 139

OSMRE is authorized to issue a 10-day notice when it has reason to believe that a person is conducting surface mining activity causing a surface disturbance in an area not covered by a permit in violation of the requirements of SMCRA. When, in response to this notice, the state agency advises OSMRE that it was taking no action because it does not consider the activity to be surface mining or a related activity, and thus a permit is not required, the interpretation of the statute advanced by the state is contrary to both the intent of SMCRA and a reasonable interpretation of state law, it is proper for OSMRE to order a Federal inspection. When, on the basis of this Federal inspection, OSMRE determines that the activity is in violation of any requirement of SMCRA, OSMRE may issue a notice of violation to the operator, fixing a reasonable time for abatement.

A state with an approved program is responsible for carrying out the provisions of SMCRA. This charge will obviously be unfulfilled if OSMRE allows the state to maintain a position contrary to that Act. When the State has clearly demonstrated that it does not intend to enforce its program, and the course of action

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977 --Continued

ENFORCEMENT PROCEDURES--Continued

Generally--Continued

adopted by the state renders it impossible for an operator to legally undertake operations which would otherwise be permitted, OSMRE is required to institute proceedings pursuant to the provisions of 30 U.S.C. § 1271(b) (1982).

Willowbrook Mining Co. v. Office of Surface Mining Reclamation & Enforcement, Pennsylvania Coal Mining Ass'n, et al. (Amici Curiae), 108 IBLA 303 (Apr. 28, 1989)

EVIDENCE

Generally

Timely performance of abatement activities required by a notice of violation cannot be considered as a stipulation by the permittee that the notice was validly issued.

Turner Brothers, Inc. v. Office of Surface Mining Reclamation & Enforcement, 107 IBLA 307 (Mar. 2, 1989)

FEDERAL LANDS

Permits

The regulations at 43 CFR 4.1360-4.1369 govern proceedings on review of approval or disapproval of applications for new surface mining permits on Federal lands and Indian lands. Any order or decision of an Administrative Law Judge disposing of a permit review proceeding is subject to review only pursuant to a petition for discretionary review filed with the Board within 30 days of receipt of the decision under the regulation at 43 CFR 4.1369(a).

The Hopi Tribe v. Office of Surface Mining Reclamation & Enforcement, 107 IBLA 329 (Mar. 10, 1989)

HEARINGS

Generally

In a proceeding upon an application for review of an NOV, the burden of going forward to establish a prima facie case as to the validity of the notice rests with OSMRE. A prima facie case is presented if OSMRE presents essential facts from which it may be determined that a violation of pertinent requirements has occurred. If OSMRE meets its burden, the ultimate burden of persuasion rests with the applicant for review.

Innovative Development of Energy, Inc. v. Office of Surface Mining Reclamation & Enforcement, 110 IBLA 119 (Aug. 8, 1989)

HYDROLOGIC SYSTEM PROTECTION

Generally

A determination that approval of a permit for a coal preparation plant will not have a significant impact on groundwater, based on an environmental assessment, will be affirmed on appeal if the record establishes that a careful review of environmental problems has been undertaken; relevant environmental concerns have been identified; and the final determination is reasonable in light of the environmental analysis.

Frank Stebly v. Office of Surface Mining Reclamation & Enforcement, 109 IBLA 242 (June 16, 1989)

When OSMRE submits evidence that water flowing from an area disturbed by surface mining operations has pH levels outside the regulatory standards at a point where the surface water leaves the permit area, a prima facie case for an alleged violation of 30 CFR 715.17(a) is established. Such evidence may be in the form of analytical tests of the water, and the results of such a test are presumptively valid in the absence

HYDROLOGIC SYSTEM PROTECTION--Continued

Generally--Continued

of rebuttal evidence that the test was not properly administered.

Innovative Development of Energy, Inc. v. Office of Surface Mining Reclamation & Enforcement, 110 IBLA 119 (Aug. 8, 1989)

IMPOUNDMENTS

Generally

Where OSMRE has assumed direct Federal enforcement of a state program, it properly declines to take enforcement action in response to a citizen's complaint where the complainant fails to establish any violation of the state equivalent of the Surface Mining Control and Reclamation Act of 1977, as amended, 30 U.S.C. §§ 1201-1328 (1982), or its implementing regulations as a result of the mine operator's construction of a permanent water impoundment and drainage channel, removal and placement of topsoil within the permitted area, and filling in of an open pit on adjacent non-permitted land.

Willie N. Cook, 107 IBLA 278 (Feb. 23, 1989)

INITIAL REGULATORY PROGRAM

Generally

When OSMRE issues a notice of violation for livestock grazing under 30 CFR 715.20(e)(2), OSMRE shall assign up to 15 points, based upon the probability of revegetation failure and erosion, under 30 CFR 723.13(b)(2)(i), and up to 7 points, based upon the extent of potential or actual damage resulting from the violation, if the damage is confined to the permit area, under 30 CFR 723.13(b)(ii). This Board will reduce the number of points assigned for a violation of 30 CFR 715.20(e)(2) when the record discloses that the probability of revegetation failure and erosion was insignificant, rather than likely under 30 CFR

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977 --Continued

INITIAL REGULATORY PROGRAM--Continued

Generally--Continued

723.13(b)(2)(i), and where other mitigating factors were shown.

Lone Star Steel Co. v. Office of Surface Mining Reclamation & Enforcement, 107 IBLA 134 (Feb. 6, 1989)

INSPECTIONS

Generally

When a citizen files a request for a Federal inspection in a state where OSMRE is enforcing the state's program, OSMRE is required to conduct a Federal inspection under 30 CFR 842.11(b)(1)(i) when the authorized representative has reason to believe on the basis of information available to him (other than information resulting from a previous Federal inspection) that there exists a violation of the Surface Mining Control and Reclamation Act of 1977, its regulations, the applicable program, or any condition of a permit or an exploration approval, or that there exists any condition, practice, or violation which creates an imminent danger to the health or safety of the public or is causing or could reasonably be expected to cause a significant, imminent environmental harm to land, air, or water resources. Under 30 CFR 842.11(b)(2), OSMRE has reason to believe that a violation exists if the facts alleged by the informant would, if true, constitute a violation. If there is a violation, OSMRE is required to take whatever action is necessary to secure abatement of the violation.

Under 30 CFR 942.816(e), in area mining, rough backfilling and grading of an area must be completed within 180 days following removal of coal from that area. If a citizen files a complaint alleging that any area from which coal has been removed has been exposed for 180 days or more, OSMRE should inspect the site and take appropriate enforcement action, excepting only where the permittee has previously demonstrated through the detailed written analysis

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977 --Continued

INSPECTIONS--Continued

Generally--Continued

required by 30 CFR 780.18(b)(3) that further time is justified.

Save Our Cumberland Mountains, Inc., 108 IBLA 70 (Mar. 23, 1989) 96 I.D. 139

When, in response to a 10-day notice, the state permanent regulatory authority informs OSMRE that it has issued two cessation orders for nonconcurrent reclamation of an abandoned minesite and is pursuing bond forfeiture, OSMRE may find such response to be appropriate within the meaning of sec. 521(a) of SMCRA, 30 U.S.C. § 1271(a) (1982). Upon such finding, no Federal inspection need ensue.

Mario L. Marcon, 109 IBLA 213 (June 12, 1989)

10-day Notice to State

OSMRE is authorized to issue a 10-day notice when it has reason to believe that a person is conducting surface mining activity causing a surface disturbance in an area not covered by a permit in violation of the requirements of SMCRA. When, in response to this notice, the state agency advises OSMRE that it was taking no action because it does not consider the activity to be surface mining or a related activity, and thus a permit is not required, the interpretation of the statute advanced by the state is contrary to both the intent of SMCRA and a reasonable interpretation of state law, it is proper for OSMRE to order a Federal inspection. When, on the basis of this Federal inspection, OSMRE determines that the activity is in violation of any requirement of SMCRA, OSMRE may issue a notice of violation to the operator, fixing a reasonable time for abatement.

Willowbrook Mining Co. v. Office of Surface Mining Reclamation & Enforcement, Pennsylvania Coal Mining Ass'n, et al. (Amici Curiae), 108 IBLA 303 (Apr. 28, 1989)

NOTICES OF VIOLATION

Generally

Where a 10-day notice to the state regulatory authority is issued in response to a violation found during a Federal oversight inspection, OSMRE may issue a notice of violation in accordance with 30 CFR 843.12(a), if the state fails to take "appropriate action" to abate the violation. Where, however, the evidence establishes that the state action was "appropriate" under the specific facts of a case, the Board will vacate enforcement actions undertaken by OSMRE.

Harman Mining Corp. v. Office of Surface Mining Reclamation & Enforcement, 110 IBLA 98 (Aug. 3, 1989)

One of the principles of res judicata and collateral estoppel is that the question expressly and definitely presented in the current litigation must be the same as that definitely and actually litigated and adjudged adversely to the Government in the previous litigation. Accordingly, the doctrines of res judicata and collateral estoppel cannot preclude OSMRE from issuing a notice of violation, enforcing a cessation order, or assessing penalties therefor if the previous violation cited by the State differs from the violation cited by OSMRE and the violation cited by OSMRE was not adjudicated before the state agency.

Innovative Development of Energy, Inc. v. Office of Surface Mining Reclamation & Enforcement, 110 IBLA 119 (Aug. 8, 1989)

OSMRE will not be deemed collaterally estopped from issuing a notice of violation and cessation order for the failure to eliminate all highwalls in violation of sec. 515(b)(3) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1265(b)(3) (1982), where the State and Federal enforcement actions did not arise from the same operative facts.

Cherry Hill Development v. Office of Surface Mining Reclamation & Enforcement, 110 IBLA 185 (Aug. 17, 1989)

NOTICES OF VIOLATION--Continued

Specificity

When a permittee has been cited for a violation of 25 CFR 216.105(i), concerning rills and gullies, the question of whether vegetation has been "established" within the meaning of that regulation is not governed by the revegetation requirements of 25 CFR 216.110. In the absence of any applicable regulation, or other agency guidance, providing a definition for "established," a dictionary definition of "established" may be applied.

The Pittsburg & Midway Coal Mining Co. v. Office of Surface Mining Reclamation & Enforcement, 107 IBLA 246 (Feb. 22, 1989)

PERFORMANCE BOND OR DEPOSIT

Forfeiture

When, in response to a 10-day notice, the state permanent regulatory authority informs OSMRE that it has issued two cessation orders for nonconcurrent reclamation of an abandoned minesite and is pursuing bond forfeiture, OSMRE may find such response to be appropriate within the meaning of sec. 521(a) of SMCRA, 30 U.S.C. § 1271(a) (1982). Upon such finding, no Federal inspection need ensue.

Mario L. Marcon, 109 IBLA 213 (June 12, 1989)

PERMITS

Generally

Where at the time of permit approval under a Federal lands program in a state without a cooperative agreement, OSMRE conditions permit approval on a state regulatory program regulation regarding subsidence control, such a condition is proper and this Board has no jurisdiction to entertain an argument that the regulation is more stringent than standards required by the

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977
--Continued

PERMITS--Continued

Generally--Continued

Surface Mining Control and Reclamation Act of 1977, and, therefore, unenforceable under state law.

The requirement that OSMRE condition approval of an underground coal mining permit on compliance with state regulatory provisions that are part of a state program necessitates that, to the extent those state standards may be inconsistent with the common law doctrine of subsidence damage mitigation, the state regulations are controlling.

OSMRE is authorized, pursuant to the National Historic Preservation Act, to impose upon an applicant for an underground coal mining permit a cultural resources condition requiring submission of a cultural resources plan including the archaeological testing of 11 sites to evaluate their eligibility for listing in the National Register of Historic Places; a cultural resource survey of areas affected by planned subsidence; and measures to be taken to mitigate disturbance of any site or sites listed in or eligible for listing in the National Register of Historic Places.

Old Ben Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 109 IBLA 362 (June 23, 1989)

Approval

The regulations at 43 CFR 4.1360-4.1369 govern proceedings on review of approval or disapproval of applications for new surface mining permits on Federal lands and Indian lands. Any order or decision of an Administrative Law Judge disposing of a permit review proceeding is subject to review only pursuant to a petition for discretionary review filed with the Board within 30 days of receipt of the decision under the regulation at 43 CFR 4.1369(a).

The Hopi Tribe v. Office of Surface Mining Reclamation & Enforcement, 107 IBLA 329 (Mar. 10, 1989)

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977
--Continued

PERMITS--Continued

Approval--Continued

Under 30 CFR 773.15(b) (1987), the regulatory authority shall, prior to approval of a permit for a surface mining and reclamation operation, make a finding that any operation owned or controlled by the applicant is not currently in violation of any Federal law, rule, or regulation, or any state law, rule, or regulation pertaining to air or water environmental protection.

Frank Stebly v. Office of Surface Mining Reclamation & Enforcement, 109 IBLA 242 (June 16, 1989)

Where at the time of permit approval under a Federal lands program in a state without a cooperative agreement, OSMRE conditions permit approval on a state regulatory program regulation regarding subsidence control, such a condition is proper and this Board has no jurisdiction to entertain an argument that the regulation is more stringent than standards required by the Surface Mining Control and Reclamation Act of 1977, and, therefore, unenforceable under state law.

The requirement that OSMRE condition approval of an underground coal mining permit on compliance with state regulatory provisions that are part of a state program necessitates that, to the extent those state standards may be inconsistent with the common law doctrine of subsidence damage mitigation, the state regulations are controlling.

OSMRE is authorized, pursuant to the National Historic Preservation Act, to impose upon an applicant for an underground coal mining permit a cultural resources condition requiring submission of a cultural resources plan including the archaeological testing of 11 sites to evaluate their eligibility for listing in the National Register of Historic Places; a cultural resource survey of areas affected by planned subsidence; and measures to be taken to mitigate disturbance of any site or sites listed in or eligible for listing in the National Register of Historic Places.

Old Ben Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 109 IBLA 362 (June 23, 1989)

PERMITS--Continued

Hearings

An individual who submits proof of residing within three-fourths of a mile of a coal preparation plant, and shows that he may be adversely affected by traffic and air pollution caused by coal trucks transporting coal to the plant has standing within the meaning of 30 CFR 700.5 to seek review of OSMRE's approval of a permit to operate the plant.

Frank Stebly v. Office of Surface Mining Reclamation & Enforcement, 109 IBLA 242 (June 16, 1989)

POSTMINING LAND USE

Generally

Where OSMRE has assumed direct Federal enforcement of a state program, it properly declines to take enforcement action in response to a citizen's complaint where the complainant fails to establish any violation of the state equivalent of the Surface Mining Control and Reclamation Act of 1977, as amended, 30 U.S.C. §§ 1201-1328 (1982), or its implementing regulations as a result of the mine operator's construction of a permanent water impoundment and drainage channel, removal and placement of topsoil within the permitted area, and filling in of an open pit on adjacent non-permitted land.

Willie N. Cook, 107 IBLA 278 (Feb. 23, 1989)

PREVIOUSLY MINED LANDS

Generally

When OSMRE submits evidence that water flowing from an area disturbed by surface mining operations has pH levels outside the regulatory standards at a point where the surface water leaves the permit area, a prima facie case for an alleged violation of 30 CFR 715.17(a) is established. Such evidence may be in the

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977
--Continued

PREVIOUSLY MINED LANDS--Continued

Generally--Continued

form of analytical tests of the water, and the results of such a test are presumptively valid in the absence of rebuttal evidence that the test was not properly administered.

Allegations that contamination of the water discharged from a sediment pond constructed pursuant to a surface mining permit to collect waters from the disturbed area was from other than the disturbed area are of no benefit to appellant without a showing that the other area was the sole source of the contamination. Water quality limitations apply to all discharges flowing from a disturbed area into a sedimentation pond constructed to achieve compliance with SMCRA.

Innovative Development of Energy, Inc. v. Office of Surface Mining Reclamation & Enforcement, 110 IBLA 119 (Aug. 8, 1989)

REVEGETATION

Generally

When OSMRE issues a notice of violation for livestock grazing under 30 CFR 715.20(e)(2), OSMRE shall assign up to 15 points, based upon the probability of revegetation failure and erosion, under 30 CFR 723.13(b)(2)(i), and up to 7 points, based upon the extent of potential or actual damage resulting from the violation, if the damage is confined to the permit area, under 30 CFR 723.13(b)(ii). This Board will reduce the number of points assigned for a violation of 30 CFR 715.20(e)(2) when the record discloses that the probability of revegetation failure and erosion was insignificant, rather than likely under 30 CFR 723.13(b)(2)(i), and where other mitigating factors were shown.

Lone Star Steel Co. v. Office of Surface Mining Reclamation & Enforcement, 107 IBLA 134 (Feb. 6, 1989)

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977
--Continued

ROADS

Generally

The construction of a private way for the sole purpose of moving a dragline from a site at which it had been used for surface mining to another site where it would again be used for surface mining is construction incidental to surface mining, and is therefore a surface mining activity which requires a permit under SMCRA.

Willowbrook Mining Co. v. Office of Surface Mining Reclamation & Enforcement, Pennsylvania Coal Mining Ass'n, et al. (Amici Curiae), 108 IBLA 303 (Apr. 28, 1989)

Where a 10-day notice to the state regulatory authority is issued in response to a violation found during a Federal oversight inspection, OSMRE may issue a notice of violation in accordance with 30 CFR 843.12(a), if the state fails to take "appropriate action" to abate the violation. Where, however, the evidence establishes that the state action was "appropriate" under the specific facts of a case, the Board will vacate enforcement actions undertaken by OSMRE.

Harman Mining Corp. v. Office of Surface Mining Reclamation & Enforcement, 110 IBLA 98 (Aug. 3, 1989)

Where a portion of a county road used as a haul road for a surface coal mining operation is not excepted from the "affected area" under 30 CFR 701.5 (1986), and, when added to the area which the operator admits is affected by its operations, causes such operations to affect more than 2 acres, the operations will not be considered exempt from compliance with the requirement to eliminate all highwalls set forth in sec. 515(b)(3) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1265(b)(3) (1982).

Cherry Hill Development v. Office of Surface Mining Reclamation & Enforcement, 110 IBLA 185 (Aug. 17, 1989)

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977
--Continued

ROADS--Continued

Construction

The construction of a private way for the sole purpose of moving a dragline from a site at which it had been used for surface mining to another site where it would again be used for surface mining is construction incidental to surface mining, and is therefore a surface mining activity which requires a permit under SMCRA.

Willowbrook Mining Co. v. Office of Surface Mining Reclamation & Enforcement, Pennsylvania Coal Mining Ass'n, et al. (Amici Curiae), 108 IBLA 303 (Apr. 28, 1989)

STATE PROGRAM

Generally

Publication in the Federal Register constitutes adequate notice of revocation of state primacy for the purposes of sec. 521(b) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1271(b) (1982).

Turner Brothers, Inc. v. Office of Surface Mining Reclamation & Enforcement, 107 IBLA 307 (Mar. 2, 1989)

OSMRE is authorized to issue a 10-day notice when it has reason to believe that a person is conducting surface mining activity causing a surface disturbance in an area not covered by a permit in violation of the requirements of SMCRA. When, in response to this notice, the state agency advises OSMRE that it was taking no action because it does not consider the activity to be surface mining or a related activity, and thus a permit is not required, the interpretation of the statute advanced by the state is contrary to both the intent of SMCRA and a reasonable interpretation of state law, it is proper for OSMRE to order a Federal inspection. When, on the basis of this Federal inspection, OSMRE determines that the activity is in violation of any requirement of SMCRA, OSMRE may issue

STATE PROGRAM--Continued

Generally--Continued

a notice of violation to the operator, fixing a reasonable time for abatement.

A state with an approved program is responsible for carrying out the provisions of SMCRA. This charge will obviously be unfulfilled if OSMRE allows the state to maintain a position contrary to that Act. When the State has clearly demonstrated that it does not intend to enforce its program, and the course of action adopted by the state renders it impossible for an operator to legally undertake operations which would otherwise be permitted, OSMRE is required to institute proceedings pursuant to the provisions of 30 U.S.C. § 1271(b) (1982).

Willowbrook Mining Co. v. Office of Surface Mining Reclamation & Enforcement, Pennsylvania Coal Mining Ass'n, et al. (Amici Curiae), 108 IBLA 303 (Apr. 28, 1989)

10-day Notice to State

When, in response to a 10-day notice, the state permanent regulatory authority informs OSMRE that it has issued two cessation orders for nonconcurrent reclamation of an abandoned minesite and is pursuing bond forfeiture, OSMRE may find such response to be appropriate within the meaning of sec. 521(a) of SMCRA, 30 U.S.C. § 1271(a) (1982). Upon such finding, no Federal inspection need ensue.

Mario L. Marcon, 109 IBLA 213 (June 12, 1989)

Where a 10-day notice to the state regulatory authority is issued in response to a violation found during a Federal oversight inspection, OSMRE may issue a notice of violation in accordance with 30 CFR 843.12(a), if the state fails to take "appropriate action" to abate the violation. Where, however, the

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977
--Continued

STATE PROGRAM--Continued

10-day Notice to State--Continued

evidence establishes that the state action was "appropriate" under the specific facts of a case, the Board will vacate enforcement actions undertaken by OSMRE.

Harman Mining Corp. v. Office of Surface Mining Reclamation & Enforcement, 110 IBLA 98 (Aug. 3, 1989)

STATE REGULATION

Generally

Where a 10-day notice to the state regulatory authority is issued in response to a violation found during a Federal oversight inspection, OSMRE may issue a notice of violation in accordance with 30 CFR 843.12(a), if the state fails to take "appropriate action" to abate the violation. Where, however, the evidence establishes that the state action was "appropriate" under the specific facts of a case, the Board will vacate enforcement actions undertaken by OSMRE.

Harman Mining Corp. v. Office of Surface Mining Reclamation & Enforcement, 110 IBLA 98 (Aug. 3, 1989)

One of the principles of res judicata and collateral estoppel is that the question expressly and definitely presented in the current litigation must be the same as that definitely and actually litigated and adjudged adversely to the Government in the previous litigation. Accordingly, the doctrines of res judicata and collateral estoppel cannot preclude OSMRE from issuing a notice of violation, enforcing a cessation order, or assessing penalties therefor if the previous violation cited by the State differs from the violation cited by OSMRE and the violation cited by OSMRE was not adjudicated before the state agency.

Innovative Development of Energy, Inc. v. Office of Surface Mining Reclamation & Enforcement, 110 IBLA 119 (Aug. 8, 1989)

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977 --Continued

TOPSOIL

Generally

When, in response to a 10-day notice, the state permanent regulatory authority informs OSMRE that it has issued two cessation orders for nonconcurrent reclamation of an abandoned minesite and is pursuing bond forfeiture, OSMRE may find such response to be appropriate within the meaning of sec. 521(a) of SMCRA, 30 U.S.C. § 1271(a) (1982). Upon such finding, no Federal inspection need ensue.

Mario L. Marcon, 109 IBLA 213 (June 12, 1989)

Redistribution

Where OSMRE has assumed direct Federal enforcement of a state program, it properly declines to take enforcement action in response to a citizen's complaint where the complainant fails to establish any violation of the state equivalent of the Surface Mining Control and Reclamation Act of 1977, as amended, 30 U.S.C. §§ 1201-1328 (1982), or its implementing regulations as a result of the mine operator's construction of a permanent water impoundment and drainage channel, removal and placement of topsoil within the permitted area, and filling in of an open pit on adjacent non-permitted land.

Willie N. Cook, 107 IBLA 278 (Feb. 23, 1989)

VALID EXISTING RIGHTS

Generally

Under the facts of this case, OSMRE properly applied the definition set forth in the permanent regulatory program approved for the Commonwealth of Virginia in determining whether applicants had valid existing rights to surface mine coal on lands located within a national forest.

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977 --Continued

VALID EXISTING RIGHTS--Continued

Generally--Continued

An applicant for valid existing rights bears the burden of proving entitlement.

Blackmore Co., Hagan Estates, Inc., 108 IBLA 1 (Mar. 20 1989)

Under the provisions of the regulation at 30 CFR 740.11(a)(3) the definition of valid existing rights found in the approved Kentucky State regulatory program is properly applied by OSMRE officials to adjudicate an application for valid existing rights to mine reserved coal deposits on Federal lands within the Daniel Boone National Forest. A decision rejecting such an application will be affirmed where the applicant has acknowledged not having applied for the necessary permits to mine the coal as of the Aug. 3, 1977, enactment of the Surface Mining Control and Reclamation Act of 1977.

The Stearns Co., 110 IBLA 345 (Sept. 14, 1989)

VARIANCES AND EXEMPTIONS

Generally

To qualify for an exemption under sec. 701(28)(A) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1291(28)(A) (1982), extraction of coal must be incidental to the extraction of other minerals and constitute less than 16-2/3 percent of the tonnage of minerals removed for purposes of commercial use and sale. The burden of proving entitlement to the exemption rests upon the party claiming it.

JDG, Inc. v. Office of Surface Mining Reclamation & Enforcement, 107 IBLA 210 (Feb. 16, 1989)

VARIANCES AND EXEMPTIONS--Continued

2-Acre

Where a portion of a county road used as a haul road for a surface coal mining operation is not excepted from the "affected area" under 30 CFR 701.5 (1986), and, when added to the area which the operator admits is affected by its operations, causes such operations to affect more than 2 acres, the operations will not be considered exempt from compliance with the requirement to eliminate all highwalls set forth in sec. 515(b)(3) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1265(b)(3) (1982).

Cherry Hill Development v. Office of Surface Mining Reclamation & Enforcement, 110 IBLA 185 (Aug. 17, 1989)

WATER QUALITY STANDARDS AND EFFLUENT LIMITATIONS

Discharges from Disturbed Areas

When OSMRE submits evidence that water flowing from an area disturbed by surface mining operations has pH levels outside the regulatory standards at a point where the surface water leaves the permit area, a prima facie case for an alleged violation of 30 CFR 715.17(a) is established. Such evidence may be in the form of analytical tests of the water, and the results of such a test are presumptively valid in the absence of rebuttal evidence that the test was not properly administered.

Allegations that contamination of the water discharged from a sediment pond constructed pursuant to a surface mining permit to collect waters from the disturbed area was from other than the disturbed area are of no benefit to appellant without a showing that the other area was the sole source of the contamination. Water quality limitations apply to all discharges flowing from a disturbed area into a sedimentation pond constructed to achieve compliance with SMCRA.

Innovative Development of Energy, Inc. v. Office of Surface Mining Reclamation & Enforcement, 110 IBLA 119 (Aug. 8, 1989)

WORDS AND PHRASES

"Supervised by an Indian tribe." As used in sec. 701(9) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1291(9) (1982), land is "supervised by an Indian tribe" where an Indian owns either the mineral estate, the surface estate in fee, or both.

Valencia Energy Co., et al., 109 IBLA 40 (May 26, 1989)
96 I.D. 239

SURFACE RESOURCES ACT

MANAGEMENT AUTHORITY

Fish and fish habitats are "other surface resources" which the Department of the Interior has authority to manage on the surface of mining claims under subsec. 4(b) of the Surface Resources Act, 30 U.S.C. § 612(b) (1982).

The Surface Resources Act granted Federal agencies authority to manage and dispose of the resources found on the surface of mining claims. When Federal management of surface resources conflicts with the legitimate use of the surface or surface resources by a mineral locator so as to endanger or materially interfere with prospecting, mining, or processing operations, or uses reasonably incident thereto, Federal management must yield to mining as the dominant and primary use.

"Endanger" and "materially interfere." The terms "endanger" and "materially interfere" used in subsec. 4(b) of the Surface Resources Act, 30 U.S.C. § 612(b) (1982), set forth the standard to be applied to determine whether a specific surface management action must yield to a conflicting legitimate use by a mining claimant. Where there is no evidence that such action endangers the claimant's operations, the question is whether the surface management activity will substantially hinder, impede, or clash with mining operations or a reasonably related use.

Robert E. Shoemaker, 110 IBLA 39 (July 13, 1989)
96 I.D. 315

SURVEYS OF PUBLIC LANDS

GENERALLY

In apportioning accreted lands between adjoining sections, BLM properly disregards partition lines previously determined by proportioning the new frontage between two zero accretion points, one of which is within an area which has subsequently been determined to have formed through the process of avulsion.

BLM is not required under the doctrine of either bona fide rights or equitable estoppel to accept a line which has been surveyed on the ground with appropriate monumentation but which has never been officially approved by BLM, even where private landowners may have relied on the monuments in purchasing land and constructing improvements.

In apportioning accreted land between adjoining sections, BLM is not required to use a privately surveyed partition line established by the perpendicular method where the private surveyor had no adequate justification for not employing the proportionate shoreline method and, thus, the line was not within the allowable limit of error.

Where BLM has failed to adequately justify not employing the proportionate shoreline method for apportioning accreted land between adjoining sections and that approach will result in an equitable apportionment of the accreted land, the Board will remand the case to BLM for adoption of that method in a corrected survey.

First American Title Insurance Co. v. Bureau of Land Management, Fort Mojave Indian Tribe (Intervenor), 110 IBLA 25 (July 7, 1989)

The Board has no jurisdiction to adjudicate the propriety of a survey conducted by or on behalf of the Forest Service or of decisions by the Forest Service accepting such survey. However, such surveys do not constitute official surveys of the public lands of the United States, as the authority to conduct such surveys and resurveys is vested solely in the Secretary of the Interior, who in turn has delegated this authority to BLM. Thus, a Forest Service survey does not effect any

SURVEYS OF PUBLIC LANDS--Continued

GENERALLY--Continued

change in the location of a corner, but is merely an administrative survey which the Forest Service uses in managing the National Forests.

An appeal from a BLM decision dismissing a protest of a BLM dependent resurvey which did not affect any corner or line separating Federal from the protestant's private land will be dismissed where the protestants were not adversely affected by the decision.

An appellant will not be regarded as having established by a preponderance of the evidence that a section corner was fraudulently established where, despite discrepancies in the internal features of other sections in the township between the original survey plat and the modern record, the original plat and modern record generally agree in the area of the disputed corner.

Wilogene Simpson et al., 110 IBLA 271 (Sept. 13, 1989)

DEPENDENT RESURVEYS

An appellant will not be regarded as having established by a preponderance of the evidence that a section corner was fraudulently established where, despite discrepancies in the internal features of other sections in the township between the original survey plat and the modern record, the original plat and modern record generally agree in the area of the disputed corner.

Wilogene Simpson et al., 110 IBLA 271 (Sept. 13, 1989)

OMITTED LANDS

An island, whether located in navigable or non-navigable waters, that is omitted from a survey remains public domain and may be surveyed and disposed of by the United States.

Olive Wheeler, 108 IBLA 296 (Apr. 27, 1989)

TIMBER SALES AND DISPOSALS

A BLM decision to proceed with a proposed timber sale will not be disturbed on appeal where the appellant has not established that BLM failed to consider relevant matters of environmental concern, such as the impact on soils, water quality, and wildlife, or that the decision was unsupported by the record or contrary to law or fact.

In re Crane Prairie Timber Sale, 109 IBLA 188 (June 12, 1989)

TRESPASS

GENERALLY

The surface owner of land patented under the Stock-Raising Homestead Act, as amended, 43 U.S.C. § 291 (1970), has standing to appeal a decision of the Bureau of Land Management concerning the ownership of certain subsurface materials, even though the surface owner was not served with a copy of the notice of trespass initiating the action, when the decision holds that the subsurface materials are owned by the United States, rather than by the surface owner.

Lazy VD Land & Livestock Co., 108 IBLA 224 (Apr. 19, 1989)

UNIFORM RELOCATION ASSISTANCE AND REAL PROPERTY ACQUISITION POLICIES ACT OF 1970
(See also Appeals--if included in this Index.)

GENERALLY

To the extent any information given by a Bureau of Reclamation representative may have suggested to claimants that relocation assistance benefits would be allowed in the amount of their claims, such advice was erroneous and cannot serve as a basis for creating rights in the claimants which are not authorized by law.

Uniform Relocation Assistance Appeals of Mr. & Mrs. Clayton Lyles & Messrs. Lonnie & Owen Lyles, 8 OHA 23 (Feb. 28, 1989)

ADMINISTRATIVE REVIEW AND APPEALS

Where the Bureau of Reclamation, upon review of a reconsideration request, determines that the full amount of benefits claimed for costs in a self-move or residential personal property is reasonable and necessary in the circumstances of the move, and approves that amount for payment, the issue of the amount of allowable benefits for such moving costs is rendered moot and the reconsideration request is properly dismissed to that extent and the prior decision of this Office on the benefits claim is so modified.

Where a request for reconsideration has been granted and the record evidence in support of the benefits claims concerned is insufficient to demonstrate claimants' eligibility for the benefits sought, the claims will remain disallowed.

Uniform Relocation Assistance Appeals of Clayton Lyles (Mr. & Mrs.), & Messrs. Lonnie & Owen Lyles (On Reconsideration by Director), 8 OHA 94 (Sept. 21, 1989)

UNIFORM REAL PROPERTY ACQUISITION POLICY

Expenses Incidental to Transfer of Title to the United States

Where the record shows reimbursement was allowed for the pro rata portion of prepaid real property taxes allocable to the period of the calendar year remaining after vesting of title to the lands in the United States, the allowance, being fair and reasonable for expenses necessarily incurred incidental to the transfer of title to the real property to the United States, will be affirmed.

Uniform Relocation Assistance Appeal of Mr. & Mrs. Peter P. Isaza, 8 OHA 89 (Aug. 11, 1989)

UNIFORM RELOCATION ASSISTANCE AND REAL PROPERTY ACQUISITION POLICIES ACT OF 1970--Continued

UNIFORM RELOCATION ASSISTANCE

Moving and Related Expenses

Generally

Documentation is necessary of actual reasonable moving and related expenses incurred in a self move of household personal property in order to determine the amount of the allowable payment to the displaced persons as reimbursement of such expenses under sec. 202(a)(1) of the Act and the implementing regulations.

A claim under sec. 202(a)(2) of the Act for costs of moving cattle from a farming and ranching operation for purposes of liquidation is properly disallowed where the evidence shows the cattle were moved and the costs were incurred in anticipation of the Government's acquisition of a flowage easement affecting a portion of the farm land and not as a result of that acquisition and displacement from the farming and ranching operation.

Uniform Relocation Assistance Appeals of Mr. & Mrs. Clayton Lyles & Messrs. Lonnie & Owen Lyles, 8 OHA 23 (Feb. 28, 1989)

Where claimants fail to establish entitlement to reimbursement for actual reasonable moving and related expenses under sec. 202(a)(1) of the Uniform Act, as amended, in an amount greater than that allowed by the National Park Service in the decision appealed from, the decision will be affirmed.

Uniform Relocation Assistance Appeals of Mr. & Mrs. Henry J. Strickland, 8 OHA 103 (Sept. 25, 1989)

Moving Expense Allowance

Generally

Separate claims for fixed payments comprised of moving expense and dislocation allowances, under sec. 202(b) of the Act, are properly disallowed where the evidence shows the dwelling on lands encumbered by the Government-acquired flowage easement from which claimants were displaced, was a single-family dwelling owned by claimants' parents, and claimants and their parents

UNIFORM RELOCATION ASSISTANCE AND REAL PROPERTY ACQUISITION POLICIES ACT OF 1970--Continued

UNIFORM RELOCATION ASSISTANCE--Continued

Moving and Related Expenses--Continued

Moving Expense Allowance--Continued

Generally--Continued

lived there together as a family unit. In such circumstances, claimants and their parents are properly regarded as one displaced person for the purpose of reimbursable moving and related expenses.

Uniform Relocation Assistance Appeals of Mr. & Mrs. Clayton Lyles & Messrs. Lonnie & Owen Lyles, 8 OHA 23 (Feb. 28, 1989)

Payments in Lieu of Moving and Related Expenses

Fixed Payment(s)

Partial Taking of Farm Operation

A claim for a fixed payment under sec. 202(c) of the Act for displacement from a farm operation, in lieu of actual reasonable moving and related expenses under sec. 202(a) of the Act, is properly disallowed where the evidence shows claimants continue the prior farm operation without substantial change after the Government's acquisition of a flowage easement affecting a portion of the farm lands.

Uniform Relocation Assistance Appeals of Mr. & Mrs. Clayton Lyles & Messrs. Lonnie & Owen Lyles, 8 OHA 23 (Feb. 28, 1989)

Taking of Business Operation

Where payment is claimed and allowed under sec. 202(a)(1) of the Uniform Act, as amended, for actual reasonable moving and related expenses in moving business and household property from acquired land, a further claim for a fixed payment in lieu of moving and related expenses with respect to the move of the personal property of the business from the acquired

UNIFORM RELOCATION ASSISTANCE--Continued

Moving and Related Expenses--Continued

Payments in Lieu of Moving and Related Expenses --Continued

Fixed Payment(s)--Continued

Taking of Business Operation--Continued

land, made under sec. 202(c) of the Uniform Act, as amended, cannot be allowed.

Uniform Relocation Assistance Appeals of Mr. & Mrs. Henry J. Strickland, 8 OHA 103 (Sept. 25, 1989)

Replacement Housing Payment for Homeowners

Generally

A claim for replacement housing differential payment benefits is properly disallowed where claimant, who was displaced from a mobile home on a rented homesite, relocated to a conventional dwelling with homesite which property cost more than that required for purchase of a mobile home replacement residence comparable to claimant's displacement residence, including the difference in rental costs for a comparable replacement homesite for a period of 4 years and 48 times the monthly rental for the Government-acquired site on which claimant's displacement mobile home was situated.

Uniform Relocation Assistance Appeal of Mrs. Betty A. Haas, 8 OHA 40 (Mar. 29, 1989)

A determination of ineligibility for replacement housing payment benefits claimed under sec. 203 of the Uniform Act, as amended, will be affirmed where the record evidence shows the displacement residence on the acquired land was not occupied by the claimants as their permanent or customary and usual residence.

Uniform Relocation Assistance Appeals of Mr. & Mrs. Henry J. Strickland, 8 OHA 103 (Sept. 25, 1989)

UNIFORM RELOCATION ASSISTANCE AND REAL PROPERTY ACQUISITION POLICIES ACT OF 1970--Continued

UNIFORM RELOCATION ASSISTANCE--Continued

Replacement Housing Payment for Tenants and Certain Others

Claims for rental replacement housing payments under sec. 204 of the Act are properly disallowed where the evidence shows the dwelling on lands encumbered by the Government-acquired flowage easement from which claimants were displaced, was a single-family dwelling owned by claimant's parents, from whom the flowage easement was acquired, and claimants and their parents lived there together as a family unit. In such circumstances claimants and their parents are properly regarded as one displaced person for the purpose of replacement housing.

Uniform Relocation Assistance Appeals of Mr. & Mrs. Clayton Lyles & Messrs. Lonnie & Owen Lyles, 8 OHA 23 (Feb. 28, 1989)

WILD AND SCENIC RIVERS ACT

BLM properly declares a placer mining claim null and void ab initio where it was located within one-quarter mile of a wild river clearly designated prior to the date of location by the Secretary of the Interior under the Wild and Scenic Rivers Act, as amended, 16 U.S.C. §§ 1271-1287 (1982), and thereby statutorily withdrawn from appropriation under the mining laws.

Andrew Van Atta, Mindy Wekselblatt, 106 IBLA 304 (Jan. 5, 1989)

Nothing in either the Wild and Scenic Rivers Act, 16 U.S.C. §§ 1271-1287 (1982), nor the Act of Oct. 12, 1976, 90 Stat. 2327, which designated the Upper Missouri Wild and Scenic River as a component of the wild and scenic river system, automatically withdrew all land within the management boundaries of the Upper Missouri Wild and Scenic River, but beyond the one-quarter mile statutory withdrawal, from the operation of the mining laws.

John R. Lynn, Joe Trow, 106 IBLA 317 (Jan. 6, 1989)

WILD AND SCENIC RIVERS ACT--Continued

Under sec. 9(a)(iii) of the Wild and Scenic Rivers Act of 1968, as amended, 16 U.S.C. § 1280(a)(iii) (1982), Federal lands within one-quarter mile of the bank of a river designated as a "wild" river are withdrawn from all forms of appropriation under the mining laws. Mining claims located thereafter on such lands are properly declared null and void ab initio.

Robert L. Payne et al., 107 IBLA 71 (Jan. 30, 1989)

Where lands were withdrawn from mineral entry in 1922 pursuant to the Federal Power Act of 1920, and in 1975 pursuant to the Wild and Scenic Rivers Act, and claimants could not show that their claims were located prior to 1975 in accordance with the Mining Claims Rights Restoration Act of 1955, appellants had no valid existing rights, and the claims were properly declared null and void ab initio.

E. J. Belding, Jr., Melinda S. Belding, 109 IBLA 198 (June 12, 1989) 96 I.D. 272

WILD FREE-ROAMING HORSES AND BURROS ACT

BLM may properly cancel a private maintenance and care agreement for a wild horse and repossess the horse where there is sufficient evidence of improper care of the adopted horse to establish that the adopter violated the terms of the agreement.

Grant F. Morey, 108 IBLA 354 (May 12, 1989)

The Board will set aside a BLM decision to remove wild horses from a herd management area where removal is not properly predicated on an appropriate determination that removal is necessary to restore the range to a thriving natural ecological balance and prevent a deterioration of the range, in accordance with sec. 3(b) of the Wild Free-Roaming Horses and Burros Act, as amended, 16 U.S.C. § 1333(b) (1982).

Animal Protection Institute of America, 109 IBLA 112 (June 7, 1989)

WITHDRAWALS AND RESERVATIONS

GENERALLY

Under the preliminary injunction order issued in Nat'l Wildlife Federation v. Burford, Civ. No. 85-2238 (D.D.C. Feb. 10, 1986), BLM was precluded from terminating powersite classifications and restoring lands described in a desert land entry application.

James A. Malesky (On Reconsideration), 106 IBLA 327 (Jan. 9, 1989)

A mining claim located on lands withdrawn for reclamation purposes under the first form is null and void ab initio. A first-form reclamation withdrawal completed prior to Oct. 21, 1976, remains in effect, subject to review by the Secretary, notwithstanding repeal of the statute authorizing the initiation of such withdrawals.

Leo & Florence Whiteman, 107 IBLA 118 (Feb. 2, 1989)

A decision vacating approval of a Native allotment application will be set aside if the record is insufficient to justify the conclusion that lands withdrawn by Exec. Order No. 2089 embrace the lands identified in an application.

Ramona Field, 110 IBLA 367 (Sept. 14, 1989)

EFFECT OF

BLM properly declares a placer mining claim null and void ab initio where it was located within one-quarter mile of a wild river clearly designated prior to the date of location by the Secretary of the Interior under the Wild and Scenic Rivers Act, as amended, 16 U.S.C. §§ 1271-1287 (1982), and thereby statutorily withdrawn from appropriation under the mining laws.

Andrew Van Atta, Mindy Wekselblatt, 106 IBLA 304 (Jan. 5, 1989)

EFFECT OF--Continued

A lode mining claim is properly declared null and void ab initio if, at the time of location, the land was withdrawn from appropriation under the mining laws of the United States.

George A. Sullivan, 107 IBLA 287 (Feb. 23, 1989)

Where a Federal district court issues a preliminary injunction which has the effect of reinstating the terms of a revoked reclamation withdrawal, which had precluded the location of mining claims, a mining claim located the day before the effective date of the preliminary injunction is not null and void ab initio, since on the date of location, the lands were open to the operation of the mining laws.

Harold Bennett et al., 107 IBLA 291 (Feb. 24, 1989)

Where a Federal district court issues a preliminary injunction which has the effect of suspending the termination of a multiple-use classification which segregated the land from mineral entry, thereby reinstating the terms of the classification, a mining claim subsequently located on land subject to that injunction is properly declared null and void ab initio.

Art Marinaccio, 107 IBLA 303 (Mar. 2, 1989)

Lands which are covered by a preliminary permit issued by the Federal Energy Regulatory Commission for a proposed power project are not open to mineral entry under sec. 2(a) of the Mining Claims Rights Restoration Act of 1955, 30 U.S.C. § 621(a) (1982), unless the land has been restored to entry under sec. 24 of the Federal Power Act, as amended, 16 U.S.C. § 818 (1982). Where a mining claim is located at a time when the lands are closed to entry under sec. 2(a) of the Mining Claims Rights Restoration Act, BLM properly declares the claim null and void ab initio.

Phillip L. Heintz, 108 IBLA 330 (May 2, 1989)

WITHDRAWALS AND RESERVATIONS--Continued

EFFECT OF--Continued

A mining claim located in part on land withdrawn from appropriation under the mining laws is null and void ab initio in part.

Oscar E. Harding, 110 IBLA 117 (Aug. 7, 1989)

POWERSITES

Under the preliminary injunction order issued in Nat'l Wildlife Federation v. Burford, Civ. No. 85-2238 (D.D.C. Feb. 10, 1986), BLM was precluded from terminating powersite classifications and restoring lands described in a desert land entry application.

James A. Malesky (On Reconsideration), 106 IBLA 327 (Jan. 9, 1989)

Lands which are covered by a preliminary permit issued by the Federal Energy Regulatory Commission for a proposed power project are not open to mineral entry under sec. 2(a) of the Mining Claims Rights Restoration Act of 1955, 30 U.S.C. § 621(a) (1982), unless the land has been restored to entry under sec. 24 of the Federal Power Act, as amended, 16 U.S.C. § 818 (1982). Where a mining claim is located at a time when the lands are closed to entry under sec. 2(a) of the Mining Claims Rights Restoration Act, BLM properly declares the claim null and void ab initio.

Phillip L. Heintz, 108 IBLA 330 (May 2, 1989)

RECLAMATION WITHDRAWALS

A mining claim located on lands withdrawn for reclamation purposes under the first form is null and void ab initio. A first-form reclamation withdrawal completed prior to Oct. 21, 1976, remains in effect, subject to review by the Secretary, notwithstanding repeal of the statute authorizing the initiation of such withdrawals.

Leo & Florence Whiteman, 107 IBLA 118 (Feb. 2, 1989)

WITHDRAWALS AND RESERVATIONS--Continued

RECLAMATION WITHDRAWALS--Continued

A mining claim located on lands subject to a first-form withdrawal at the time of location is null and void ab initio.

Stewart L. Ashton, 107 IBLA 140 (Feb. 6, 1989)

REVOCATION AND RESTORATION

Under the preliminary injunction order issued in Nat'l Wildlife Federation v. Burford, Civ. No. 85-2238 (D.D.C. Feb. 10, 1986), BLM was precluded from terminating powersite classifications and restoring lands described in a desert land entry application.

James A. Malesky (On Reconsideration), 106 IBLA 327 (Jan. 9, 1989)

Where a Federal district court issues a preliminary injunction which has the effect of reinstating the terms of a revoked reclamation withdrawal, which had precluded the location of mining claims, a mining claim located the day before the effective date of the preliminary injunction is not null and void ab initio, since on the date of location, the lands were open to the operation of the mining laws.

Harold Bennett et al., 107 IBLA 291 (Feb. 24, 1989)

Where a Federal district court issues a preliminary injunction which has the effect of suspending the termination of a multiple-use classification which segregated the land from mineral entry, thereby reinstating the terms of the classification, a mining claim subsequently located on land subject to that injunction is properly declared null and void ab initio.

Art Marinaccio, 107 IBLA 303 (Mar. 2, 1989)

WITHDRAWALS AND RESERVATIONS--Continued

STATE SELECTIONS

BLM may properly declare a mining claim located on land segregated from mineral entry, pursuant to 43 CFR 2627.4(b), by virtue of the filing of an Alaska State selection application, null and void ab initio when there is no showing that the claim relates back to a date of location prior to the segregation.

Sec. 906(e) of ANILCA, 43 U.S.C. § 1635(e) (1982), amended the Alaska Statehood Act to permit the State to file new applications to include lands which were not vacant, unappropriated, and unreserved at the time the sec. 906(e) "top filing" application was filed. Such State selection applications become an effective selection upon the date the lands become available within the meaning of the Alaska Statehood Act. Lands subject to valid mining claims on the date a state "top filing" application is filed become subject to state selection when the claims are abandoned, either intentionally or by action of law.

Vernon F. Miller, 110 IBLA 20 (July 6, 1989)

WORDS AND PHRASES

"Service." A notice of appeal from a decision of the Bureau of Land Management must be filed within 30 days after the person taking the appeal is "served" with the decision from which the appeal is taken. Where BLM mails its adverse decision to an address other than the person's last address of record and the decision is returned by the Postal Service because a forwarding order has expired, the decision has not been constructively "served." In these circumstances, an appeal which is subsequently filed within 30 days of the person's receipt of actual notice of the adverse decision is timely.

Jean Emanuel Hatton, Eva M. Pool, Phillip Emanuel, 107 IBLA 47 (Jan. 27, 1989)

"Adjoining landowners." The term "adjoining landowners," as used in 43 CFR 2711.1-2(b), does not include individuals who own cornering lands, since in the administration of the public land laws the terms "contiguous" or "adjoining" have been consistently defined and construed to exclude "cornering" lands.

Henry J. Warmuth, 108 IBLA 130 (Apr. 3, 1989)

"Last address of record." In the processing of an application for assignment of a coal lease, the last address of record for the purposes of 43 CFR 1810.2(b) is the address stated on the application unless the applicant or an authorized representative has filed written notice of a change of address. When an application is accompanied by a letter from the applicant's attorney which states that the attorney is to be contacted concerning certain matters, the attorney's address is the "last address of record," and delivery of a document to that address constitutes service of the document upon the applicant, regardless of whether it was actually received by the attorney. Where the address provided by the attorney does not specify a suite, office number, or floor, "delivery" of the document is accomplished when it is received in the building indicated in the address.

5M, Inc., 109 IBLA 334 (June 22, 1989)

"Endanger" and "materially interfere." The terms "endanger" and "materially interfere" used in subsec. 4(b) of the Surface Resources Act, 30 U.S.C. § 612(b) (1982), set forth the standard to be applied to determine whether a specific surface management action must yield to a conflicting legitimate use by a mining claimant. Where there is no evidence that such action endangers the claimant's operations, the question is whether the surface management activity will substantially hinder, impede, or clash with mining operations or a reasonably related use.

Robert E. Shoemaker, 110 IBLA 39 (July 13, 1989)
96 I.D. 315

"Proprietary information." Proprietary information means information, which, if disclosed, would do substantial harm to the competitive position of the outside source from which it was obtained and would inhibit the Government's ability to obtain this type of information in the future, resulting in a substantial detrimental effect on a Government program. Internally generated Governmental conclusions and information are not generally proprietary.

B. A. Wilford, 110 IBLA 154 (Aug. 11, 1989)

"Workability." Although the definition of "workability" concerns the extent of known deposits, the test of workability is dependent upon intrinsic economic factors, which take into account whether the value of extraction of the mineral is greater than the cost of its extraction.

American Gilsonite, 111 IBLA 1 (Sept. 19, 1989)
96 I.D. 408